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In the Supreme Court of the United States

OCTOBER TERM, 1975

ROBERT C. HAHN,

Petitioner,

vs.

FRANCIS W. SARGENT, et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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The petitioner, ROBERT C. HAHN, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this case on September 18, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is docketed as *Hahn* v. *Sargent* et al, No. 75-1087. The opinion of the United States District Court for the District of Massachusetts is reported as *Hahn* v. *Sargent*, 388 F. Supp. 445 (D. Mass. 1975). These opinions are printed as Appendices A and B respectively, to this petition. (App. 1 & 14).

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on September 18, 1975. By order dated 13 January 1976, Mr. Justice Brennan extended the time for filing this Petition to and including February 15, 1976. This petition was filed within the extended time. This court has jurisdiction under 28 USC 1254(1)(2); Rule 19-1(a)(b) U.S.S.C.; and 42 USC 1983, 1985(2)(3), 1986.

QUESTIONS PRESENTED

1. Does the First Circuit decision violate judicial due process, by ignoring a plaintiff's allegations and their inferences in a civil rights complaint and without trial giving full weight to defendants' allegations and their inferences taken from collateral material as a basis for allowing defendants' motions to dismiss?

2. Does the First Circuit decision violate judicial due process, by ignoring a plaintiff's counter affidavits with supporting documentation on material issues of intent and credibility, and without trial giving full weight to defendants' unsupported categorical denials regarding the same material issues as a basis for allowing defendants' motions for summary judgment?

3. Does the First Circuit decision violate fourteenth amendment due process, by condoning a public prosecutor's deliberate suppression of critical exculpatory evidence from a grand jury, where an accused was two years later found "Not Guilty" after chance disclosure of said exculpatory evidence during his trial?

4. Does the First Circuit decision violate fourteenth

amendment due process, by condoning a public prosecutor's deliberate suppression of critical exculpatory evidence from an accused, which evidence although unknown to accused had been twice requested by general motion, and where accused was two years later found "Not Guilty" after chance disclosure of said exculpatory evidence during his trial?

5. Does the First Circuit decision violate reasonable standards in considering prosecutorial immunity in a civil rights action, by finding no bad faith — no knowing misconduct — no unreasonable action, where even after request a public prosecutor for two years deliberately suppressed exculpatory evidence from a grand jury, from an accused and from a state court?

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall any state deprive any person of life, liberty or property, without due process of law . . ."

STATEMENT OF THE CASE

The original proceeding is a civil rights action by petitioner against nine defendants arising out of alleged violations of 42 United States Code Sections 1983, 1985(2), 1985(3) and 1986 as set forth in Counts 1, 2, 3 and 4 of plaintiff's amended complaint. (App. 31).

This petition seeks review of a decision of the United States Court of Appeals for the First Circuit, affirming a United States District Court decision wherein summary judgment was allowed as to Count 1 and dismissal as to Counts 2, 3 and 4. (App. 2).

The gist of petitioner's allegations is that respondents individually and in concert in what essentially became a political maneuver to protect or to advance their various economic and political interests, suppressed exculpatory evidence from the grand jury and used false and suspect testimony before the grand jury to put petitioner, who was both a practicing lawyer and his party's State Chairman, to indictment and to trial, thereby putting him in a bad light, with the inevitable consequence despite chance disclosure of said exculpatory evidence at his trial, and despite his ultimate acquittal, of interfering with his federal right to due process and his federal right to freely engage in the political process.

Petitioner is a citizen of the United States, a citizen of Massachusetts and a resident of the federal district of Massachusetts. At all times pertinent to the complaint herein, petitioner was a Republican, a former State Representative, a former candidate for the Republican nomination for Attorney General, Republican State Chairman of Massachusetts and a political activist. Respondents are citizens of the United States, citizens of Massachusetts and residents of the same federal district. And at all times pertinent to the complaint herein, respondent Sargent was Governor of Massachusetts and a Republican; respondent Quinn was Attorney General of Massachusetts, a Democrat, and a reported candidate for the 1974 nomination for Governor; respondent Cowin was Secretary of Consumer Affairs for Massachusetts, a Republican and a reported candidate for the 1974 Republican nomination for Attorney General; respondent Ryan was Commissioner of Insurance for Massachusetts; respondent Irwin was an Assistant Attorney General of Massachusetts and Chief of the Criminal Division; respondent Rowe was an Assistant Attorney General of Massachusetts and a Trial Counsel in the Criminal Divi-

sion; respondent Berman was owner of the controlling interest in Rockland Mutual Insurance Company of Massachusetts; respondent Miller was a practicing attorney and General Counsel for Rockland; respondent Prasinos was a practicing attorney and a Trial Counsel for Rockland.

Although there was substantial favorable response to petitioner's political activism among many Republican groups, his political activism apparently did not please a close and powerful aide to Sargent who said, "Bob, with your independence and your knack for getting through to people, you're an uncomfortable guy to have around". During this time, James Kirk, an acquaintance of petitioner and a fellow lawyer, with the approval of Prasinos and Berman who were worried about an unexplained delay in Rockland's application for authority to write bodily injury no-fault insurance, asked petitioner to check into the delay of an insurance license application by Berman's company then pending before Ryan. Petitioner found Ryan favorably disposed to the application, but bothered about his (Ryan's) recent association in law practice with Berman's lawyer (Miller) and bothered about Rockland's poor claims record. Ryan told petitioner he felt compelled to impose certain restrictions on the proposed license, felt petitioner's presence in the matter might mitigate his (Ryan's) problem with Miller and promised to expedite his decision. At Berman's invitation Kirk and petitioner met with him and reported this meeting with Ryan. Pleased and grateful the decision had been brought to a head, Berman offered to make petitioner a director of Rockland which petitioner declined. So Berman proposed to make Kirk a director of Rockland and Chairman of the new Claims Committee, an arrangement which Berman and Kirk later settled at a $5000 retainer per year for three years. Berman still wanting to show his appreciation to petitioner offered to buy

one or two tables at a Republican fund raiser at $500 per table. Also in gratitude Berman got Kirk some family law business. But Berman was very upset about the proposed restrictions which would limit Rockland's writings and cut its income. Although petitioner had advised he should accept them, Berman later sent Miller to try to ease the restrictions. But Ryan stood fast. Miller also told Ryan he was sore because Berman had questioned his effectiveness by comparing petitioner's and Kirk's performance with his. Later Berman personally met with Cowin, Ryan's superior, and apparently bargained to ease the restrictions. Apparently in return, Cowin bargained to get a friend into Rockland's management. Berman apparently tried to improve his bargaining position by telling Cowin about good money (approximately $3500) he had given Sargent and apparently by falsely suggesting petitioner had promised to take care of the restrictions. Cowin asked Berman to put this in writing but Berman, highly agitated, refused and accused Cowin of "sucking his life blood". Apparently apprehensive about his own role in this bargaining session with Berman, and possibly seeing petitioner as a political rival, Cowin apparently told Sargent about Berman's highly agitated mental state, about Berman's talk of good money he had given Sargent and about petitioner's alleged promise to take care of the restrictions. Sargent, apparently also upset and apprehensive about Berman's mental state and his talk about the money he had given Sargent, accepted Cowin's offer to handle the situation. Cowin met with Berman and Miller as a result of which a false story was shaped up which suggested that petitioner and Kirk were volunteers, had never been invited by Berman or anyone connected with Rockland to intervene and were trying to victimize or shake Berman down. The story was publicly launched in a so-called hearing arranged by Cowin before

Ryan with full media coverage, in which Cowin and Miller participated, during which no mention was made of the exculpatory evidence including Berman and Prasino's invitation to Kirk or to petitioner or of Berman's cash gift to Sargent, or of Ryan's conflict of interest with Miller, or of Cowin's effort to gain control over Rockland. Not only during this hearing Ryan failed to object to the establishing of facts for the record he knew or should have known to be false, he also made no effort to disqualify himself. In addition to the media start given the false story by the so-called hearing, Sargent, allegedly acting on a so-called report from Cowin, further dignified the false story by transmitting it to Quinn for investigation. Later, on 10 May 1972, Miller also went out of his way to implant the false story about petitioner and Kirk at the Supreme Judicial Court by foisting himself on a hearing then in progress regarding Rockland, which implanted story was reported by the news media. Shortly thereafter petitioner was defeated for re-election as Republican State Chairman. Despite a full account of the facts voluntarily given Quinn by petitioner and despite critical exculpatory evidence in petitioner's favor developed by State Police investigators, which Quinn kept from petitioner, Quinn instituted criminal proceedings against petitioner. Quinn, Irwin and Rowe blocked petitioner's effort to go before the Grand Jury to testify. On behalf of Quinn, both Irwin and Rowe presented Berman's false story about petitioner to the Grand Jury, during which Quinn, Irwin and Rowe suppressed the critical exculpatory evidence in petitioner's favor and made knowing use of false, suspect and partial testimony by Berman, Cowin, Ryan and Prasinos. On behalf of Quinn, both Irwin and Rowe, twice lied to the Court by denying the Attorney General had any evidence exculpatory to petitioner. In early February 1974, Cowin turned over material to pe-

titioner's counsel, including his raw notes made in March 1972 that contained material exculpatory to petitioner. When the indictment against petitioner was tried, the critical exculpatory evidence suppressed by Quinn, Irwin and Rowe was discovered by the Court and ordered turned over to petitioner's attorney, and Berman's false, suspect and partial testimony became apparent, as well as a critical "half truth" Prasinos had told the Grand Jury. It was also revealed there was "bad blood" between Kirk and Irwin arising out of a prior civil matter between them, as a result of which Irwin was forced to withdraw from cross examination of Kirk. Petitioner was found "Not Guilty".

Obviously this is a hard case.

First, the case involves alleged cover-up by certain respondents formerly in high government position and of substantial and varied political, financial and social influence — a cover-up based on their natural desire to keep their situations and their reputations intact.

In addition, the case involves a continued effort by petitioner, an individual of modest means and position, to meet the combined strength of these respondents together with the power of government they originally brought to bear in putting petitioner to indictment and to trial — a power still much at their disposal in the instant case, in that public money is paying the legal expenses of six of the nine respondents and other public resources are available for the preparation of their cases.

And finally, because this case is essentially rooted in politics, it involves a traditional although diminishing reluctance of Federal Courts to become involved in political matters, perhaps on the consideration that politics is a rough game — with high stakes — with its own disciplines

— with its own rules — and those who get involved in politics must bear its risks.

But hard cases are not uncommon in the law. The history of the struggle of the individual against abuse of power and the advantage of position is much the history of one hard case after another, as bit by bit the law has equalized the scales for the individual.

So it is firm policy in this country that all persons are equal before the law. And petitioner assumes he stands equally before this Court with each of the respondents regardless of their background or their position: that petitioner's family — his reputation — his goals — his life — his character — his rights — are equally to be considered by this Court as those of each of the respondents.

And while petitioner knows and is willing to accept most of the risks of politics, petitioner suggests there must be a line drawn somewhere — where the rule of law supersedes the rule of politics — where the law will step in and say, "In some instances political maneuvers cannot be shrugged off as 'just politics' — and in this instant case it was an unlawful political maneuver to try to put petitioner in jail on 'a trumped-up charge' ". In fact, petitioner suggests the alleged acts of various respondents here are far more extreme than "the dirty tricks" for which a recent federal Court imposed criminal liability.

And petitioner says therein lies the heart of this case — that at a demonstrable stage of the circumstances behind this case, it became politically and economically expedient for certain of these respondents to cover up a potentially explosive and embarrassing situation — a situation largely of their own making — a situation in which their own political and personal involvement were highly questionable.

So seizing on petitioner's fortuitous and routine presence

in the periphery of the situation, some of the respondents banded together and conspired to use petitioner's presence to drag a herring across their own trail — and by abusing administrative procedure contrived a so-called hearing with full media coverage, thereby creating a media event to put petitioner in a bad light, primarily to divert attention from their own questionable conduct but also to get petitioner out of politics while they were at it.

And others of the respondents seeking to make political capital, seized on the situation and joined the conspiracy to put petitioner in a bad light — and by suppressing exculpatory evidence and abusing legal procedure procured an indictment of petitioner, thereby creating a political event — and by putting him to a criminal trial, created a further political event.

While allegations of serious import and consequence to the respondents are not easily to be accepted, neither are they lightly to be dismissed. And at this stage in a case of this sort, petitioner is entitled to have his allegations and the inferences therefrom — the alleged invasion of his civil rights — taken most favorably to him, together with the benefit of the usual standards applied to motions to dismiss or for summary judgment, especially in matters of intent, good faith and credibility which are so much part of this case.

And finally, petitioner rejects any express or implied suggestion that he or any person, by going into politics forfeits his civil rights, and thereby becomes a second-class citizen.

REASONS FOR ISSUING WRIT

The First Circuit decision in this case seriously undermines this Court's affirmation of well established principles

in the construction of civil rights complaints and in the disposition of motions to dismiss and/or for summary judgment.

Petitioner contends it is not the function either of the Circuit Court or of the District Court before trial to try to decide whether a plaintiff can prevail at trial, but only to decide whether on the pleadings a plaintiff has established triable issues.

Yet throughout the First Circuit opinion and the District opinion, both courts not only have slanted their summary of facts in favor of the respondents, but without trial have made critical findings of fact in favor of the respondents.

Furthermore petitioner contends not only he has pleaded with sufficient particularity to substantially support his conclusory allegations if his pleadings and their inferences are taken most favorably to him, but has held his principal ground with oppositions and counter-affidavits. And that interpretive posture petitioner contends the lower courts must assume at this pre-trial stage.

Secondly, the First Circuit decision seriously undermines a fourteenth amendment due process principle developed by this Court in *Brady* v. *Maryland* and extended in *Giles* v. *Maryland*.

As petitioner has suggested, the prosecutor respondents suppressed critical evidence their own investigators developed independently, that not only was exculpatory to petitioner but raised serious doubts about the trustworthiness of their chief witness, a respondent here.

Petitioner contends that because this Court's *Brady-Giles* rule requires that a prosecutor should seek justice, not victims — due process in this case requires that exculpatory evidence not only should have been turned over

to petitioner or his counsel without request, it should have been part of the prosecutor respondents' presentment to the grand jury.

Finally, the First Circuit decision fails to acknowledge the probable thrust of this Court's decision in *Scheuer* v. *Rhodes,* which while specifically dealing with the question of executive immunity, nevertheless affirms common law guidelines of good faith and reasonable action that in all likelihood should apply to the question of prosecutorial immunity, an important issue in the instant case.

Accordingly, petitioner contends the deliberate suppression of exculpatory evidence, coupled with the fact that twice his counsel requested any such evidence and twice in court the prosecutor respondents denied they had any evidence exculpatory to petitioner, should bear heavily on any claim the prosecutor respondents make for immunity from the instant suit.

I.

The decision below directly conflicts with judicial due process principles enunciated in this Court's *CONLEY* ruling and related Federal cases.

It is well established that a plaintiff's case which alleges civil rights violations must be examined in a light most favorable to the plaintiff in considering motions to dismiss; that is, *the allegations of the complaint and the inferences to be drawn therefrom must be taken most favorably to the plaintiff.* So in order to grant a motion to dismiss it must appear "beyond doubt" that plaintiff can prove no set of facts at trial in support of his claim which would entitle him to relief. *Conley* v. *Gibson,* 355 U.S. 41, (1957); see also *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974); and see

Nanez v. *Ritger,* 304 F. Supp. 354 (1969). (emphasis supplied).

Furthermore, in civil rights cases it is also a basic rule that the *Civil Rights Acts are to be given a liberal and not a narrow construction. Basista* v. *Weir,* 340 F. 2d 74, (CCA3 1965). (emphasis supplied).

With these rules of construction in mind, petitioner contends that a fair reading of the First Circuit's summary of facts, not only presents a fact picture almost totally different from the picture presented by a fair reading of petitioner's amended complaint, but the First Circuit's summary presents a picture so favorable to respondents an uninformed reader would have absolutely no idea what petitioner's complaint could be.

While the Circuit Court gives lip service to the rule that petitioner's allegations and inferences are to be taken most favorably to him, they defend their use of respondents' allegations and inferences to the exclusion of petitioner's allegations and inferences, by going to *"the record* which the district court held did not present any genuine issue of material fact . . . " (App. 3). (emphasis supplied).

This so-called record, for all practical purposes, consists primarily of respondents' several repetitions of Berman's unchallenged and untested false story. And this cycled and recycled Berman story is contained in the transcript of unchallenged grand jury testimony (under the coaching of Irwin and Rowe), the transcript of an unchallenged administrative hearing (under the coaching of Cowin) and the unsupported affidavits of four respondents.

Significantly, the Court did *not* include in this "so-called record" either petitioner's complaint or any of his counter affidavits and supportive material.

So in petitioner's view, for the Circuit Court to characterize this material as "a record" is not only a misnomer, but lends a legal dignity and presumptive effect to the material it does not warrant either legally or practically. For a record in the usual legal sense, is an accumulation of evidence from *all* parties subjected to the give and take of trial, including confrontation, examination and cross examination of witnesses, adversary examination of exhibits and so on.

Even if it were argued the lower courts are simply referring to a pre-trial record, even by that concept, such a record should at least include the pre-trial material supplied by the plaintiff. After all, a plaintiff's allegations in a civil complaint are the prima facie facts that start the case.

But petitioner contends these one-sided respondent-produced materials on which both lower courts rest their decision in the instant case to the exclusion of anything produced by petitioner, fail to come up to the standard of a record by either concept.

Except then for the challenge petitioner has tried to mount by the instant case, the first and only time petitioner had the opportunity to challenge the Berman story as repeated and as embellished by the various respondents was when he came to trial in spring 1974, nearly two years after indictment.

And petitioner's trial, which included the chance disclosure of critical exculpatory evidence which had been in the public prosecutors' possession for two years, which they suppressed from the grand jury and from petitioner and which they twice denied in open court they had, resulted in petitioner, along with his co-defendant, being found "Not Guilty". And during that trial petitioner testified to the same story alleged in his present complaint.

So despite the Circuit Court's declaration that petitioner has presented no material issues, it is fair to assume there must have been something about petitioner's story — something about his demeanor — something about his witnesses — something about the exculpatory evidence — some issue of material fact thereby created, that contributed to his acquittal.

Yet by ignoring petitioner's allegations and documentation and their inferences and thereby denying the prima facie and presumptive effect petitioner's version is entitled to, both lower courts have built their opinions around a fact pattern that makes the respondents look good and petitioner look bad, thereby giving prima facie and presumptive effect to respondents' version of the facts. In fact, an uninformed reader might well wonder why petitioner even bothered to file a complaint.

Therefore in petitioner's view, by inverting the usual presumptions, the usual rules and the usual standards of construction applied in this type case and at the pre-trial stage of this case, both the Circuit Court and the District Court have so far departed from the accepted and usual course of judicial proceedings by dismissing Counts 2, 3 and 4 of his civil rights complaint as to deny petitioner judicial due process.

II.

The decision below directly conflicts with judicial due process principles enunciated in this Court's *POLLER* ruling, its *SCHEUER* ruling, and related federal cases.

In the usual situation when the Court examines opposing affidavits to determine if there is a fact issue, not only is it well settled that summary judgment is not to be granted if it is inappropriate, *in matters involving questions of intent*

and credibility, it is generally held that summary judgment is particularly inappropriate. It is only when witnesses are present and subject to cross examination that their credibility and the weight to be given to this testimony can be appraised. *Trial by affidavit is no substitute for trial by jury.* And in any event, it is only where it is perfectly clear that there are no issues in the case that a summary judgment is proper. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620 (1944). (emphasis supplied).

With these principles in mind, let's examine how the Circuit Court handled the opposing affidavits arising out of respondents' several motions for summary judgment.

Four respondents filed affidavits in support of their motions for summary judgment. And each affidavit referred to a crucial issue involving intent and credibility raised by petitioner in his amended complaint.

Sargent swore neither he nor anyone in his behalf ever received any contribution from Berman whatsoever.

Cowin swore he never met with Berman on or about 10 March 1972.

Ryan swore he never knowingly gave false testimony to the Grand Jury or at petitioner's trial.

Rowe swore that during the state trial petitioner never stated or suggested that the prosecution was making use of false or perjured testimony.

Petitioner met Sargent's affidavit by counter-affidavit with an attached copy of a sworn statement made by Berman in court in petitioner's presence, that he had personally given Sargent between $3000 and $3500 dollars in cash, a major issue in the case. The Circuit Court ignored Berman's sworn statement. (App. 35, 37).

Petitioner met Cowin's affidavit by counter-affidavit with an attached copy of a sworn statement by Kirk, made in

Court in petitioner's presence, referring to a conversation between Kirk and Berman on or about 10 March 1972, where Berman said he had just come from a meeting with Cowin, and told Kirk some of what he and Cowin had talked about. This is another major issue in the case. The Circuit Court ignored Kirk's sworn statement. (App. 39, 42).

Petitioner countered Ryan's affidavit in the only practical way possible by stating, "The issue as to whether Ryan knowingly gave false testimony cannot be resolved by affidavit but only by trial." (App. 40). Petitioner contends it would simply take too long to pick up each pertinent allegation from the complaint and attempt to try these issues by affidavit. And federal courts generally recognize this as a practical posture. Suffice it to further say, that an important exhibit introduced by petitioner at his state trial, consisting of a piece of postmarked mail from Ryan to petitioner, clearly demonstrated that Ryan testified falsely on a significant matter. This exhibit, after trial, mysteriously disappeared from the trial clerk's office before petitioner or his counsel could pick it up. One can only speculate as to what happened to the exhibit.

Petitioner met the Rowe affidavit by counter-affidavit and by attaching a portion of the state trial transcript which contained a statement by Rowe in open Court and in petitioner's presence, that the prosecution had no evidence exculpatory to petitioner. (App. 45, 47). At that point in the state trial it didn't occur to petitioner's counsel to make an issue of the use of false or suspect testimony because he was still unaware of the existence of the exculpatory Berman statements. But he certainly made issue after the State Court found the statements and ordered them turned over to petitioner's counsel.

Respondents Prasinos, Miller and Berman also filed af-

fidavits. But the subject matter raised therein either was so complex or otherwise was so inappropriate to resolution by affidavit that petitioner met these in the only practical way possible. And that is, by suggesting the issues must be held for trial and pointing out why. Again, petitioner suggests federal courts generally recognize the practicality of this posture.

Despite this significant documentation filed by petitioner in the District Court, and included by petitioner in the Appendix filed with the Circuit Court, the Circuit Court not only ignored petitioner's documentation but went on to criticise petitioner for failing to respond adequately to respondents' motions and accused petitioner of merely presenting "a compendious replica of the complaint, supplemented by assertions that certain issues could only be resolved by trial, and promises to "offer evidence . . . " . (App. 7, 8).

Very simply, petitioner contends that with his documented counter-affidavits, he rendered the passing of money between Sargent and Berman a triable issue — the meeting on or about 10 March 1972 between Cowin and Berman a triable issue — the deliberate suppression of exculpatory evidence by Quinn, Irwin and Rowe a triable issue. Beyond that, issues such as "not intending petitioner harm," or, "not intentionally giving false testimony," which these respondents tried to resolve by categorical denial under oath, and which denials both lower courts apparently accepted, can by their very nature only be resolved by trial. Federal courts have traditionally said so. And petitioner quoted them.

The Circuit Court also described petitioner's complaint as detailing, *"not* only events in which respondent was a participant, but those in which he was not. It (the complaint) purports to examine not only respondents' actions,

but their thoughts as well". And the Court footnotes a quote from paragraph 26 of petitioner's complaint, which admittedly is a conclusory allegation as to Cowin's probable intent on certain forestated facts in the complaint. (App. 7).

But this quote is taken out of context. What the lower court fails also to show are the factual allegations from which this inference is drawn.

And while petitioner admits different persons can draw different inferences from the same facts, he contends that in context the inference he has drawn, while obviously favoring him, is not unreasonable. In fact, as petitioner understands the law, the lower court at this stage is also supposed to draw inferences that favor petitioner, much less criticize him for so doing.

The Circuit Court also states, "Much of the complaint focuses on events which occurred in private encounters in petitioner's absence. The alleged participants having denied petitioner's allegations, there can be little utility in permitting petitioner to pursue his theories at trial." (App. 8).

But as petitioner has already pointed out, what both lower courts seem to have done is to invert the usual presumptions and the usual rules of construction affirmed by this Court and traditionally followed by other Federal Courts. Both lower courts have given prima facie effect to the respondents' statement of facts in this case in lieu of petitioner's statement of facts. In addition they have given prima facie effect to respondents' unsupported categorical denials regarding material issues in lieu of petitioner's supported counter affidavits.

In other words both lower courts have pre-judged this case in favor of the respondents on every material issue, without trial, without examination and cross-examination of

witnesses, without observation of demeanor and attitude of witnesses and without considering any further evidence that would be adduced at trial.

Certainly petitioner feels he met his original pleading burden with a particularized complaint. But particularized pleading neither requires a plaintiff to disclose every bit of evidence he proposes to adduce at trial nor to append a list of witnesses he intends to use at trial. Nor at this stage of proceedings is petitioner required to prove his entire case, but only to demonstrate he can meet particular challenges on particular issues selected by respondents seeking summary judgment. And petitioner feels he has met this burden as well.

But what can a plaintiff do if a lower court will only consider what his opponents have filed and refuse even to acknowledge the existence either of his pleadings or his countering material that is plainly there for the lower courts to see? Petitioner is doing the only thing left for him to do. He is appealing to this Court for justice.

Again then, petitioner feels that by deciding issues involving intent and credibility either without considering all the pre-trial evidence or without trial, both the Circuit Court and District Court have so far departed from the accepted and usual course of judicial proceedings by allowing motions for summary judgment on Count 1 of his civil rights complaint as to further deny petitioner judicial due process.

III.

The decision below directly conflicts with due process principles developed by this Court's *BRADY-GILES* rulings.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> " . . . nor shall any state deprive any person of life, liberty or property, without due process of law . . . "

In 1963 this Court said in *Brady* v. *Maryland*, 373 U.S. 83:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecutor."

Four years later, in 1967, this Court expanded this principle in *Giles* v. *Maryland*, 386 U.S. 66, by stating:

> *"The State's obligation is not to convict but to see that so far as possible, truth emerges.* No respectable interest of the state is served by its concealment of information which is material, generously conceived to the case, including all possible defenses . . . *The State's pursuit is justice, not a victim.* If it has in its exclusive possession specific, concrete evidence which is not merely cumulative or embellishing and which may exonerate the defendant or be of material importance to the defense — *the state is obliged to bring it to the attention of the Court and the defense* . . . And on the need for "a request", the Court said, it saw *"no reason to make the result turn on the adventious circumstances of a request.* If the defense does not know of the existence of the evidence, it may not be able to request its production. A murder trial — indeed any criminal proceeding, is not a sporting event." (emphasis supplied).

Yet, in the instant case, speaking on the issue of suppression of exclupatory evidence raised by petitioner, the First Circuit Court said, "The tardy and reluctant disclosure of exculpatory evidence establishes no triable issue, for,

even accepting as true the allegations of the complaint, petitioner suffered no prejudice as a consequence of the late discovery. The material was made available in time to aid the defense in its cross-examination of Berman, and the appellant was acquitted." (App. 9).

Can it sensibly be argued that petitioner suffered no prejudice — no damage, from the indictment and its attendant publicity, together with the burden and the suspense of a nearly two year wait between indictment and trial?

After all, the adverse publicity buildup that often precedes an indictment together with the adverse publicity collateral to and immediately after indictment is often where the greatest damage is done. The intensity of this early adverse publicity is what an accused sees and hears — and his family — and his neighbors — and his friends — and his enemies — and those people in general who are part of his constituency if he is a public person.

Simply because petitioner got chance possession of the alleged exculpatory evidence during trial and was cleared, lends no credence to the lower Court's suggestion that petitioner was not prejudiced by the prosecutors' suppression of this evidence before indictment, during the grand jury session and before trial. Our life with our fellows teaches us that the smear of public accusal can never be fully rubbed out despite acquittal. The thought clings that where there was smoke there probably was fire.

Furthermore, who finally made the exculpatory evidence available? Certainly not the prosecutors. It was the state trial court during an in camera inspection of the prosecution's file who chanced on the evidence and ordered the prosecutors to give it to petitioner's counsel.

It seems that both lower courts have simply ignored the mandatory disclosure principle carefully worked out by this

Court in *Brady* and *Giles*. In addition, both lower courts have ignored the fact that the Supreme Judicial Court of Massachusetts has adopted the *Brady-Giles* rule, and by its own rule has clearly and emphatically imposed the *Brady-Giles* disclosure burden on Massachusetts public prosecutors as special representatives of the Commonwealth. (App. 48).

Despite these two court rulings and despite their special duty under these rules, the prosecutor respondents have done exactly as they pleased with this exculpatory evidence. And their flagrant disregard for due process persists even now in refusing discovery of said evidence in the instant case.

Certainly the suppression of exculpatory evidence from the grand jury and from the petitioner had at least a two-fold effect. The grand jury was deprived of the chance to weigh the exculpatory evidence. The petitioner was deprived of the chance either to try to use this evidence as a basis for appearing before the grand jury, or moving to quash the indictment in court. And the very fact the prosecutors felt the need to suppress this exculpatory evidence raises serious doubts about the strength of their case in the first instance.

Petitioner contends therefore, he most certainly was sorely prejudiced and damaged by this suppression of exculpatory evidence. And if this suppression is proved at trial, in petitioner's view it follows as a matter of law under *Brady-Giles* there was federal due process violation by the prosecutor respondents.

The Circuit Court also said, "Petitioner produced before the district court no specific items of exculpatory evidence which the prosecution failed to lay before the grand jury." In fact the Circuit Court went on to comment by footnote, "Petitioner pursued none of the avenues open to him

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through the Federal Rules of Civil Procedure to develop such evidence, neither taking depositions, nor serving interrogatories". (App. 9).

Again, petitioner is constrained to point out that the Circuit Court simply ignored material petitioner had taken great pains to put in the case.

To begin with, in paragraph 47 of his amended complaint, petitioner pointed out there were three separate pre-indictment statements by Berman. And in as much detail as he could, petitioner recalled the substance of the exculpatory evidence contained in these statements. (App. 49). This was from petitioner's best memory, for before the end of the trial in the state case, the judge made sure that all copies of the exculpatory evidence were turned back to the prosecution and further asked assurance from each defendant's counsel they had turned back or planned to turn back all copies.

When petitioner entered the instant case in the District Court, one of his pre-trial motions requested that the District Court impound Berman's three statements containing this exculpatory evidence. The Court denied the motion. (App. 50). Later under a discovery procedure agreed upon between all parties and their counsel, petitioner requested that respondents Quinn, Irwin and Rowe produce these statements for inspection and copying. (App. 54). The prosecutor-respondents refused. Later, on 15 November 1974, petitioner renewed his motion to impound by asking the court to mark it for re-hearing. (App. 57). The court failed to mark it.

So in conclusion, on the foregoing, petitioner contends that the First Circuit decision which condoned deliberate suppression of exculpatory evidence by respondents Quinn, Irwin and Rowe, violates his federal right to due process under the Fourteenth Amendment.

IV.

The decision below directly conflicts with immunity principles developed by this Court in its *SCHEUER* ruling and related Federal cases.

In commenting on prosecutorial immunity the Circuit Court said, "Appellant has adduced no evidence of bad faith, knowing misconduct or unreasonable action on the part of Quinn, Rowe or Irwin, in their presentation of evidence to the grand jury". (App. 9).

Although there appears to be some contradiction in the cases as to whether prosecutorial immunity is absolute or qualified, it does appear a basic test is applied in many immunity situations. And that test seems to be whether or not the particular defendant was acting in good faith and inside the scope of their responsibility. See for example, *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974) (executive immunity); *Hilliard* v. *Williams*, 465 F 2d 1212 (CCA6 1972) (prosecutor immunity); *Bryant* v. *Kentucky*, 490 F2d 1273 (CCA6 1974) (witness immunity). And if the Court finds there was not good faith under the circumstances, if the person did not act reasonably and did not act within the scope of their responsibility, immunity is not available to them, and to that extent the immunity is a limited one.

In fact the root principle of qualified immunity, especially in cases involving conspiracy or malicious prosecution, which is much the gist of the instant case, apparently was established early in English law:

> "*A qualified immunity* could be claimed by witnesses and other informers connected with the unsuccessful prosecution. *As long as these had acted under the compulsion of the law and in good faith, they were protected from suit;* not so if they could be shown to

> have been guilty of any collateral corruption, malice or covin. Commissioned judges, justices of the peace, bailiffs or other court officers who had assisted in the prosecution of the accused occupied a very similar position. If they had acted in pursuance of their duties and within the scope of their offices, they were exempt from suit; *but if they had gone outside of their duties, they might be held liable*". *J. W. Bryan*, The Development of the English Law of Conspiracy, John Hopkins Press, 1910. pp. 24, 25. (emphasis supplied).

In a recent federal case involving a prosecutor who suppressed exculpatory evidence in an alleged murder case, and who claimed immunity, the language suggests that because of his prejudicial conduct the court simply imposed an estoppel against his claim of immunity:

> "We hold that factual averments of the complaint as summarized above, considered in a light most favorable to plaintiff, charge the District Attorney General with acts which were outside his quasi-judicial capacity and beyond the scope of 'duties constituting an integral part of the judicial process'. *We are not willing to extend the doctrine of quasi-judicial immunity to a complaint charging deliberate suppression of an FBI laboratory report establishing the innocence of the defendant*". *Hilliard* v. *Williams*, 465 F 2d 1212 (CCA 6 1972) (emphasis supplied).

And similar guidelines have been established by this Court for executive officers. In the recent case of *Scheuer* v. *Rhodes* which involved the good faith and reasonableness of the Governor of Ohio in calling out the National Guard during the Kent State disturbance, this Court thoroughly reviewed the subject of executive immunity, decided it was a qualified immunity, and speaking through Chief

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Justice Burger, said:

> "A qualified immunity is available to officers of the executive branch of Government, *the variation dependent upon the scope of discretion and responsibilities of the officer* and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. *It is the existence of reasonable grounds for the belief formed at the time and in the light of all the circumstances, coupled with a good faith belief,* that affords the basis for qualified immunity of executive officers for acts performed in the course of official conduct." *Scheuer* v. *Rhodes,* 416 U.S. 232, (1974) (emphasis supplied).

In accordance with the foregoing principles plaintiff contends that any claim for immunity by the prosecutor respondents should fall within the guidelines established by the *Scheuer* case, the *Hilliard* case and early common law. Good faith (although under *Brady-Giles* good or bad faith may no longer be a factor), the reasonableness and the propriety of their acts have been put in issue not only by petitioner's allegations and the inferences therefrom, but by petitioner's oppositions and counter affidavits to these respondents' motions to dismiss and/or for summary judgment.

If these respondents, as public prosecutors, did suppress exculpatory evidence from the petitioner, did suppress exculpatory evidence from the grand jury, and did twice lie in Court about having any exculpatory evidence, they acted in bad faith and outside the scope of their responsibility. Petitioner contends this Court should estop them from claiming immunity.

SUMMARY

When you come right down to it, due process or funda-

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mental fairness is the common thread running through each of the questions petitioner has presented to this Court.

Insofar as the handling of petitioner's complaint in the lower courts is concerned, if it is basic judicial due process that the civil rights acts are to be construed liberally, that the allegations and their inferences in a civil rights complaint are to be construed most favorably to a plaintiff, that certain issues should be held for trial either because of their intrinsic nature or because of the balance struck between opposing affidavits in motions for summary judgment, then fundamental fairness certainly requires that these standards should apply to all cases regardless of the identity or the position of the principals involved.

Insofar as the handling of exculpatory evidence is concerned, if fourteenth amendment due process requires that a prosecutor's main thrust be to seek justice — he should be held to that course not only in his dealings with an accused and in his dealings with a court, but in his dealings with a grand jury which after all is an arm of the court.

In other words, *if it is fundamentally unfair for a prosecutor to suppress exculpatory evidence from an accused to weaken his defense — and if it is fundamentally unfair for a prosecutor to suppress exculpatory evidence from a court to procure a conviction — then it is fundamentally unfair for a prosecutor to suppress exculpatory evidence from a grand jury to procure an indictment.*

When you consider that a prosecutor usually has exclusive control over the evidence the grand jurors will consider, the prosecutor should bear a special responsibility to disclose to them all his evidence about a potential accused — the evidence that helps as well as the evidence that hurts.

In fact, if the grand jury is to bear the responsibility of deciding to indict or not to indict with all the attendant con-

sequences to the person who may be the focus of a presentment, then as their basic starting facts, the grand jurors should have all the evidence the prosecutor has considered so they can decide for themselves where the truth may lie and which course they should take to pursue that truth. Perhaps they will see the prosecutor's evidence as the prosecutor sees it — perhaps they won't. But after all, it should be the grand jury's decision, not the prosecutor's, whether on all the available evidence indictment seems warranted or not warranted. That's what the grand jury it for.

And when you come right down to it, a prosecutor would only want to suppress exculpatory evidence if he thinks that evidence might weaken his presentment in the eyes and the minds of the grand jurors. And he would only think this way if he wants an indictment. So the very moment a prosecutor decides to suppress exculpatory evidence from a grand jury to point his presentment toward indictment — he has decided to seek a victim and not justice. The prosecutor has become a predator.

So if the prosecutor makes his presentment and suppresses evidence that favors his intended victim, he makes the grand jury his unwitting tool in suborning false or suspect testimony — he makes the grand jury his unwitting tool in seeking a victim. The prosecutor has turned the grand jury proceeding into a predatory proceeding.

And if the grand jury indicts, the prosecutor has thereby misled the grand jury into publicly accusing a person on evidence the prosecutor not only knows is partial but knows is false or suspect because it has been taken out of the context of the entire evidence available.

So having procured an indictment by rigging his evidence, the prosecutor can sit back and enjoy the fruits of his deception without bearing the responsibility. He can

say, "I didn't indict, the grand jury did!"

And therein may lie the key to curbing much of the reported widespread prosecutor abuse of grand juries.

If this Court will hold that as a reasonable extension of its *Brady-Giles* rule, prosecutorial suppression of exculpatory evidence from a grand jury violates fourteenth amendment due process, it is bound to cut down unwarranted presentments, unwarranted indictments and unwarranted criminal cases.

So in the instant case, common sense certainly suggests, that if the prosecutor respondents were so leery of exculpatory evidence in their possession they suppressed it from the grand jury, and refused to disclose it to petitioner even on request, and denied in court its very existence, and refuse even now to allow the petitioner to inspect or copy it, it is fair to assume the evidence so strikes at the heart of their original case, that had they disclosed this exculpatory evidence to the grand jury in the first instance let alone to petitioner, there may well have been neither indictment nor trial.

And by any reasonable standard it certainly would seem that such actions by the prosecutor respondents were clearly outside their duties, clearly showed bad faith, were clearly unreasonable and were clearly prejudicial to petitioner. Therefore the respondent-prosecutors should be estopped from claiming immunity.

Before closing, petitioner feels he should point out to this Court a matter he also pointed out to the Circuit Court:

> " . . . Plaintiff would like respectfully to suggest, that should this Court see fit to remand this case for trial on any or all the issues raised by plaintiff, the Court might also consider recommending that the case be

assigned to an outside District Judge who knows none of the principals involved."

" . . . During the pendency of this case below, plaintiff's counsel received an urgent phone call with a follow-up letter from one defendant's counsel, suggesting a close personal relationship between the District Judge and his client".

" . . . Inasmuch as the information was nothing new to plaintiff, he was puzzled both by the urgency of the call and by the letter. So not knowing what better to do plaintiff advised his counsel to do nothing. But it may be this defendant's counsel was wise in commenting on the relationship, and it might therefore be wise to avoid even the suggestion of bias in any further proceedings herein." (App. 59).

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit in this case.

Respectfully submitted,

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12 December 1975

No.

In the Supreme Court of the United States

OCTOBER TERM, 1975

ROBERT C. HAHN,

Petitioner,

vs.

FRANCIS W. SARGENT, et al,

Respondents.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 75-1087

ROBERT C. HAHN,

PLAINTIFF, APPELLANT,

v.

FRANCIS W. SARGENT, ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[388 F. Supp. 445]

(Hon. JOSEPH L. TAURO, *U.S. District Judge*)

Before COFFIN, *Chief Judge*,
MCENTEE, *Circuit Judge*, and MURRAY*, *District Judge*

Robert C. Hahn, with whom *Hahn and Matkov* was on brief, for appellant, *Alex Prasinos*, pro se.

Richard E. Eurich, with whom *Morrison, Mahoney & Miller* was on brief, for Alan G. Miller, appellee.

Michael Eby, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, *Hiller B. Zobel, Thomas G. Dignan, Jr.*, and *Paul B. Galvani*, Special Assistant Attorneys General, were on brief, for Francis W. Sargent, Robert H. Quinn, John J. Irwin, Jr., Harvey F. Rowe, Jr., John G. Ryan, and William I. Cowin, appellees.

Alfred J. Disciullo, Jr., on brief for Wendell Berman, appellee.

September 18, 1975

COFFIN, *Chief Judge*. Appellant, a former chairman of the Massachusetts Republican party, filed this action under four sections of the Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985(2), 1985(3) and 1986, alleging that appellees' partici-

* Sitting by designation.

pation in events which led to his indictment, defeat in his efforts to be reelected as state party chairman, and acquittal by a jury, constituted a conspiracy to violate his constitutional rights. Appellees are two private attorneys, a businessman, and the former Governor, Attorney General, two Assistant Attorneys General, Secretary of Consumer Affairs, and Insurance Commissioner of the state of Massachusetts. They are alleged variously to have perjured themselves, suborned perjury, suppressed evidence and manipulated administrative processes in an effort to destroy appellant's political career by generating adverse publicity and procuring his indictment. The district court dismissed three counts of the complaint and granted summary judgment as to the fourth. *Hahn* v. *Sargent*, 388 F. Supp. 445 (D. Mass. 1975). We affirm.

The district court granted summary judgment with respect to appellant's claim under 42 U.S.C. § 1983. Federal Rule of Civil Procedure 56(c) provides:

> ". . . if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact . . . ."

judgment "shall be rendered forthwith". In determining whether summary judgment is appropriate the court must "look at the record . . . in the light most favorable to . . . the party opposing the motion . . . ." *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 473 (1962). Similarly the court must indulge all inferences favorable to the party opposing the motion. *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Rogen* v. *Ilikon*, 361 F.2d 260, 266 (1st Cir. 1966). These rules must be applied with recognition of the fact that it is the function of summary judgment, in the time hallowed phrase, "to pierce formal allegations of facts in the pleadings. . . .", *Schreffler* v. *Bowles*, 153 F.2d 1, 3

(10th Cir. 1946), and to determine whether further exploration of the facts is necessary. *Briggs* v. *Kerrigan*, 431 F.2d 967, 968 (1st Cir. 1970).

The language of Rule 56(c) sets forth a bifurcated standard which the party opposing summary judgment must meet to defeat the motion. He must establish the existence of an issue of fact which is both "genuine" and "material". A material issue is one which affects the outcome of the litigation. To be considered "genuine" for Rule 56 purposes a material issue must be established by "sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First National Bank of Arizona* v. *Cities Service Co., Inc.*, 391 U.S. 253, 289 (1968). The evidence manifesting the dispute must be "substantial", *Fireman's Mut. Ins. Co.* v. *Aponaug Mfg. Co., Inc.*, 149 F.2d 359, 362 (5th Cir. 1945), going beyond the allegations of the complaint. *Beal* v. *Lindsay*, 468 F.2d 287, 291 (2d Cir. 1972).

With these standards and objectives in mind, we examine the record which the district court held did not present any genuine issue of material fact as to appellant's § 1983 claims. The story, as reflected in the transcripts of grand jury testimony by some of the appellees, portions of the transcript of appellant's trial, the transcript of an administrative hearing, several documents and the affidavits submitted by appellees, is as follows. The Rockland Mutual Insurance Company, controlled by appellee Berman, applied to the Commissioner of Insurance, appellee Ryan, for authority to write bodily-injury automobile liability insurance. Ryan denied the application, and Rockland, represented by appellee Miller obtained a state court order requiring Ryan to hold hearings on Rockland's application. Sometime shortly before February 17, 1972, after Ryan had

held the hearing and had tentatively decided to grant the application subject to certain conditions, but before he had begun to write his decision, he was contacted by a member of the staff of appellee Sargent, then Governor of Massachusetts, who told Ryan to expect a call from appellant on "an insurance matter". On February 17, 1972, appellant met with Ryan for "five or ten minutes", expressing his hope that Rockland's application would be treated fairly. Ryan reported the substance of this conversation to his superior, the Secretary of Consumer Affairs, appellee Cowin, who instructed Ryan to bring appellant to see him. Appellant, Ryan and Cowin met in Cowin's office on February 25, 1972. Appellant evinced concern that if Rockland's application was not soon approved the company would fail. Ryan and Cowin indicated that the decision, which was by then partially written, would be favorable although subject to conditions. Three days later, in response to a phone call from appellant, Ryan read him the list of conditions which would be imposed on Rockland by the yet-to-be-released decision. On March 2, 1972, after several more calls, Ryan sent appellant a copy of the decision which was on the same day released.

On March 3, 1972, Rockland's attorney of record, appellee Miller, went to Ryan's office, discussed the conditions imposed on Rockland by the decision, and then recounted the story told him by Berman on an unsolicited offer of political assistance and subsequent claim of successful intervention by appellant and another attorney named Kirk. Ryan immediately arranged to take Miller to tell his story to Cowin that afternoon. On March 16, 1972, Berman accompanied by Miller met with Cowin and one of his assistants. Berman said that he had initially been contacted by Kirk, a personal friend of a Rockland staff attorney, appellee Prasinos. Kirk had extended several offers of help to

Berman through Prasinos, and finally arranged for Berman to meet with him and appellant the morning of February 28, 1972. At that meeting, Berman told Cowin, appellant and Kirk indicated that they could assure Rockland of favorable action on its application by Ryan. Berman did not, he said, authorize such intervention; nevertheless Kirk called soon after to advise Berman that appellant had been successful in his efforts on behalf of Rockland. A few days later, Berman stated, Kirk had called suggesting that an appropriate fee for the services rendered by him and appellant would be $75,000, and that Berman should in addition purchase several tables at a fund raising dinner. Later, according to Berman, the fee demands were reduced, and then, when Kirk heard that Berman had been summoned to Cowin's office, withdrawn.[1]

Cowin asked Berman to make a written statement rehearsing the story which he had just told. Berman, after several days deliberation, refused to make such a statement. Cowin then asked Ryan to reopen the hearing on Rockland's application to permit him to put into the record, without revealing the names of Kirk and appellant, a summary of the events surrounding appellant's involvement with the application. A hearing was held on March 31, 1972, at which Cowin testified and was cross-examined by Miller.

Beginning on March 3, when Miller first reported Berman's story of appellant's offer of assistance, Cowin had kept Governor Sargent's office apprised of significant de-

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[1] This portion of the tale — the contacts between Berman and appellant and those between Berman and Kirk — we draw from the testimony and affidavits of Miller, Ryan and Cowin. Berman, testifying before the grand jury which subsequently indicted both appellant and Kirk, related a slightly different story, indicating that the request for a $75,000 fee had been made the afternoon of February 28, 1972, when Kirk called Berman to report appellant's success on behalf of Rockland. This concededly reveals the existence of an issue of fact. Indeed, we are left uncertain as to what in truth transpired between Berman, Kirk and appellant, but the factual issue as to whether the fee request was made on February 28 or a few days later is not material. *See infra.*

velopments. Contemporaneous with his testimony at the reopened Rockland hearing, Cowin referred the matter to the Attorney General, appellee Quinn, who after further investigation, instructed two of his assistants, appellees Rowe and Irwin, to bring the evidence before a grand jury. Appellant and Kirk were indicted and brought to trial. During the trial testimony of Berman the defense requested that the court examine the prosecution's records of prior statements given by Berman. The court, after examining the materials in camera, ordered the prosecution to make available to defense counsel several items not revealed in response to previous requests for exculpatory evidence. These materials were available to the defense when Berman was cross-examined. The jury acquitted both defendants. Kirk has since died.

Appellant, in his long narrative complaint, tells a different tale. Berman, he says, solicited his help through Kirk, and thereafter, delighted at the report that Rockland's license would be granted, offered to make Kirk an officer of Rockland as compensation, and to purchase $500 worth of tickets to a party fund raiser. The allegation that he volunteered to help and then demanded a huge fee, appellant states, was concocted by Berman at a meeting with Cowin on March 10, 1972, in an effort to secure elimination of the conditions imposed on Rockland by Ryan's decision. (Cowin's affidavit denies that such a meeting took place.) Cowin, Ryan and Sargent, according to appellant, availed themselves of Berman's allegations which they knew to be false, to engineer the destruction of appellant, a political rival, and to disguise their own misdeeds.

Appellant contends that Quinn, a Democrat, was content to go along with the scheme which promised to spill Republican blood. To this end, appellant says, Quinn, Rowe and Irwin both tolerated perjured testimony by several of the

other appellees, and suppressed exculpatory evidence.

The complaint details not only events in which appellant was a participant, but those in which he admittedly was not. It purports to examine not only appellees' actions, but their thoughts as well.[2] Rule 56 provides a procedure for culling from a complaint allegations which cannot be proven. Each side is permitted to submit affidavits "made on personal knowledge" setting forth "such facts as would be admissible in evidence" and showing "affirmatively that the affiant is competent to testify to the matters stated therein." The Rule specifies that affidavits may be supplemented by the results of discovery conducted by the litigants, and then instructs that

> "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

Appellant responded to appellees' motions for summary judgment, affidavits and documentary evidence with four affidavits. These, rather than setting forth appellant's personal knowledge of "such facts as would be admissible in evidence at trial in support of the allegations . . . in his . . . to the facts asserted, presented a compendious replica of the complaint, supplemented by assertions that certain issues could only be resolved by trial, and promises to "offer evidence", and showing appellant's competence to testify

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[2] For example, paragraph 26 of the complaint alleges in part:

"Defendant Cowin, apprehensive about defendant Berman's mental state and apprehensive that he might reveal defendant Cowin's attempt to use his office to gain control over Rockland, saw this false story as an opportunity not only to divert attention from his own improper conduct, but also an opportunity to eliminate plaintiff as a factor in the Republican Party of Massachusetts and a possible political rival . . . ."

complaint." Even assuming, *arguendo*, that the allegations of the complaint stated a cause of action under 42 U.S.C. § 1983,[3] few of those allegations survived as genuine issues of fact at the time the district court granted summary judgment. With respect to Ryan, Cowin, Miller, Sargent and Prasinos appellant offered no evidence sufficient to establish the existence of a genuine issue of fact. Promises that evidence would be forthcoming were not enough. *Donnelly* v. *Guion*, 467 F.2d 290, 293-94 (2d Cir. 1972); *DeBardeleben* v. *Cummings*, 453 F.2d 320, 324 (5th Cir. 1972).

> "While we believe that the plaintiff is entitled to all favorable inferences, he is not entitled to build a case on the gossamer threads of whimsey, speculation and conjecture." *Manganaro* v. *Delaval Separator Co.*, 309 F.2d 389, 393 (1st Cir. 1962).

Much of the complaint focuses upon events which occurred in private encounters in appellant's absence. The alleged participants having denied appellant's allegations, there can be little utility in permitting appellant to pursue his theories at trial. *Dyer* v. *McDougall*, 201 F.2d 265, 268-69 (2d Cir. 1952).

The record does establish that Berman told the grand jury a story different from that which Miller, Ryan and Cowin state that he told them. Appellant contends that Quinn, Rowe and Irwin deliberately suppressed evidence of Berman's inconsistency, failing to reveal it to the grand jury, or upon pre-trial motions for exculpatory evidence. As we have noted, *supra*, at appellant's criminal trial, in response to a defense motion, the court ordered the prosecution to make available to the defense certain materials relating to prior statements by Berman. These facts, however, fail to present a material issue for trial.

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[3] We express no view as to the correctness of the district court's conclusion that most of the allegations of the complaint stated no cause of action under § 1983. *See Hahn* v. *Sargent*, 388 F. Supp. 445, 450-54 (D. Mass. 1975).

The limits of prosecutorial immunity are not yet clear. *Compare Imbler* v. *Pachtman*, 500 F.2d 1301 (9th Cir. 1974), *cert. granted*, 43 U.S.L.W. 3465 (2/24/75), *with Hilliard* v. *Williams*, 465 F.2d 1212 (6th Cir. 1972), *and Hilliard* v. *Williams*, ... F.2d ..., 17 Cr. L. Rep. 2228 (6th Cir. 1975); *see Guerro* v. *Mulhearn*, 498 F.2d 1249, 1256 (1st Cir. 1974). Nevertheless, we are convinced that whatever standard of prosecutorial immunity the Supreme Court eventually adopts will require that bad faith or unreasonable action be shown. *See Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). Appellant has adduced no evidence of bad faith, knowing misconduct or unreasonable action on the part of Quinn, Rowe or Irwin, in their presentation of evidence to the grand jury. Cowin, Ryan, Berman and Prasinos all testified before the grand jury, exposing what inconsistencies there were between their stories. Appellant produced before the district court no specific items of exculpatory evidence which the prosecution failed to lay before the grand jury.[4]

The tardy and reluctant disclosure of exculpatory evidence establishes no triable issue, for, even accepting as true the allegations of the complaint, appellant suffered no prejudice as a consequence of the late disclosure. The material was made available in time to aid the defense in its cross-examination of Berman, and appellant was acquitted. *See United States* v. *Principe*, 499 F.2d 1135, 1138-39 (1st Cir. 1974); *United States* v. *McGovern*, 499 F.2d 1140, 1142-43 (1st Cir. 1974); *Woodcock* v. *Amaral*, 511 F.2d 985, 990-91 (1st Cir. 1974).

State of mind is difficult to prove and great circumspection is required where summary judgment is sought on an issue involving state of mind. *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464 (1962). But that does not

[4] Appellant pursued none of the avenues open to him through the Federal Rules of Civil Procedure to develop such evidence, neither taking depositions, nor serving interrogatories.

mean that a party against whom summary judgment is sought is entitled to a trial simply because he has asserted a cause of action to which state of mind is a material element. There must be some indication that he can produce the requisite quantum of evidence to enable him to reach the jury with his claim. *Washington Post Co.* v. *Keough,* 365 F.2d 965 (D.C. Cir. 1966).

Since we find the district court was correct in granting summary judgment with respect to all of the other appellees, whatever disputes may have survived with respect to Berman's conduct and testimony were immaterial. Section 1983 does not provide a vehicle for the adjudication of claims against a single private individual. Nor can appellant's complaint under § 1983 that appellees conspired to deprive him of his constitutional rights survive the determination that no genuine and material fact persists with respect to the allegations against the appellees other than Berman. We therefore conclude that the district court was correct in granting summary judgment with respect to count I of the complaint.

We next address appellant's claim under 42 U.S.C. § 1985(3) that appellees conspired to deprive him of equal protection of the laws.[5] In *Griffin* v. *Breckenridge,* 403 U.S.

[5] Section 1985(3) provides:

"If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the

88 (1971), the Supreme Court held § 1985(3) applicable to a private conspiracy to interfere with the activities of a black civil rights worker. The Court explicitly avoided definition of the exact scope of the section, stating that "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." 403 U.S. at 102. A considerable diversity of views has developed among the Courts of Appeals with respect to the breadth of § 1985(3)'s applicability to both private conspiracies[6] and official conspiracies.[7] One limitation imposed by the Court's language in *Griffin* does however, prevail whether the substance of the section is given a broad or narrow gloss. There must be a "class-based, invidiously discrminatory animus behind the conspirtors' action." The Court emphasized that the "motivation aspect of § 1985(3) focuses not on scienter in relation to deprivation of rights but on invidiously discriminatory animus." 403 U.S. at 102, n. 10. We have recently interpreted this requirement to mean that "the complaint must allege facts showing that the defendants conspired against the plaintiffs because of their membership in a class and

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United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

[6] *See, e.g., Richardson* v. *Miller*, 446 F.2d 1247 (3d Cir. 1971) (firing of employee due to his exercise of First Amendment rights held actionable); *Bellamy* v. *Mason's Stores, Inc. (Richmond)*, 508 F.2d 504 (4th Cir. 1974) (firing of employee because of Ku Klux Klan membership held not actionable); *Westberry* v. *Gilman Paper Co.*, 507 F.2d 206 (5th Cir. 1974), *vacated pending rehearing en banc*, and then dismissed by stipulation of the parties, 43 U.S.L.W. 2431 (conspiracy to murder environmental activist held actionable); *Marlowe* v. *Fisher Body*, 489 F.2d 1057 (6th Cir. 1973) (denial of promotion and overtime due to religion and national origin held actionable); *Dombrowski* v. *Dowling*, 459 F.2d 190 (7th Cir. 1972) (refusal to rent office to lawyer because of race of clients held not actionable); *Action* v. *Gannon*, 450 F.2d 1227 (8th Cir. 1971) (en banc) (black activist organization's interference with services in predominantly white church held actionable).

[7] *See, e.g., Glasson* v. *City of Louisville*, ____ F.2d ____ (6th Cir. 1975) (police destruction of anti-Nixon posters held actionable); *Lesser* v. *Braniff Airways, Inc.*, ____ F.2d ____ (7th Cir. 1975) (wrongful arrest and removal from airline ticket counter held not actionable).

that the criteria defining the class were invidious." *Harrison* v. *Brooks*, ... F.2d ... (1st Cir. 1975). *See Hughes* v. *Ranger Fuel Corp., Division of Pittston Co.*, 467 F.2d 6 (4th Cir. 1972); *Arnold* v. *Tiffany*, 487 F.2d 216 (9th Cir. 1973), *cert. denied*, 415 U.S. 984 (1974), *but see Richardson* v. *Miller*, 446 F.2d 1247 (3d Cir. 1971).

Appellant also contends that appellees injured him by conspiring to obstruct justice in violation of 42 U.S.C. § 1985(2) which provides

> "Second. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impending, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; . . . ."

There is a dearth of authority construing § 1985(2). We are inclined to read that portion of the section's language following the semicolon as paralleling § 1985(3), and subject, therefore, to the same doubts and limitations rooted in *Griffin* as § 1985(3). Both sections are directed toward

"equal protection of the laws", the key phrase in the Court's analysis in *Griffin*. 403 U.S. at 102. And there is nothing to suggest that the phrase was used in a different sense in § 1985(2) than it was in § 1985(3). *See Kelly* v. *Foreman*, 384 F. Supp. 1352 (S.D. Tex. 1974); *Phillips* v. *Singletary*, 350 F. Supp. 297 (D. S. Caro. 1972). Having established no "class-based, invidiously discriminatory animus", appellant can proceed no farther under the second part of § 1985(2) than he could under § 1985(3).

The first part of § 1985(2), preceding the semicolon, is addressed to conspiracies to interfere with parties, jurors or witnesses in proceedings in federal courts. Appellant makes no allegation of injury stemming from a conspiracy to interfere with federal proceedings.

Finally, appellant claims a violation of 42 U.S.C. § 1986 which renders liable

> "[e]very person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do . . . ."

As the district court held, the dismissal of appellant's claim under § 1986 falls upon the rejection of his § 1985 claims.

Affirmed.

APPENDIX B

United States District Court
District of Massachusetts

ROBERT C. HAHN,

Plaintiff,

vs.

FRANCIS W. SARGENT, et al.,

Defendants,

CIVIL ACTION No. 74-1908-T

OPINION AND ORDER

TAURO, D. J. January 10, 1975

Plaintiff, a former chairman of the Republican State Committee, brings this action against nine defendants whom he alleges acted individually, or with varying degrees of cooperation, to deprive him of his rights under the First and Fourteenth Amendments to the United States Constitution. The nine defendants and the positions they held during the period of time covered by this complaint are:

FRANCIS W. SARGENT, Governor of Massachusetts
ROBERT H. QUINN, Attorney General of Massachusetts;
WILLIAM I. COWIN, Secretary of Consumer Affairs;
JOHN G. RYAN, Commissioner of Insurance;
JOHN J. IRWIN, Assistant Attorney General;

HARVEY F. ROWE, Assistant Attorney General;

WENDELL BERMAN, Holder of the Controlling Interest, Rockland Mutual Insurance Company;[1]

ALAN G. MILLER, General Counsel, Rockland Mutual Insurance Company;

ALEX PRASINOS, Trial Counsel, Rockland Mutual Insurance Company

Jurisdiction is based on 28 U.S.C. § 1343. Each of the amended complaint's four counts alleges violation of a different section of Title 42 of the United States Code (viz: 1983, 1985(2), 1985(3), 1986). The defendants have each moved to dismiss the amended complaint or, in the alternative, for summary judgment. On December 13, 1974, after an extended hearing, defendants' motions were taken under advisement.[2]

According to the allegations of the complaint, plaintiff was elected Massachusetts Republican State Chairman in November, 1971. In mid-February, 1972, he met at least once with the defendant Commissioner Ryan to express his interest in a pending application of the Rockland Mutual Insurance Company to write bodily-injury automobile liability insurance in the Commonwealth.

On February 28, 1972, following his meeting with Ryan, plaintiff and Attorney James T. Kirk, now deceased, reported to the defendant Berman, of Rockland Mutual, that the company's application prospects appeared favorable. Berman, however, had never requested that plaintiff intercede with respect to the company's application and reported plaintiff's activities to defendant Miller, Rockland's General Counsel.

On March 2, 1972, Miller received a copy of Ryan's tentative decision granting the Rockland application, subject to a number of conditions.[3] The next day, Miller met

with Ryan and expressed his distress at the activities of Hahn and Kirk. Ryan reported this conversation to his superior, Secretary Cowin, who met personally with Miller and Berman on March 16. During that meeting, Miller and Berman claimed that plaintiff had demanded Berman pay him $75,000.00 in cash and also purchase $5,000.00 worth of tickets to political fund-raising events, apparently as compensation for his services.

A few weeks later, on March 31, 1972, Ryan re-opened the hearing on the Rockland application.[4] At this hearing, Cowin testified as to his conversations with Miller and Berman. Final approval of the Rockland application was announced by Commissioner Ryan on May 31, 1972.

Sometime after his meeting with Berman and Miller, but before Ryan re-convened the Rockland hearings, Cowin submitted a written report on the alleged activities of plaintiff and Kirk to Governor Sargent who, in turn, transmitted the information to Attorney General Quinn. After an investigation by the Attorney General's office, plaintiff and Kirk were indicted in mid-June, 1972 by a Suffolk County Grand Jury for their alleged activities in connection with the Rockland application. Both were acquitted on March 5, 1974, following a Superior Court bench trial.

Plaintiff was defeated for re-election as Republican State Chairman in May, 1972.

Plaintiff now brings this action charging that the activities of the defendants which led to his indictment constituted violations of his constitutional rights. He broadly alleges that he was the victim of malicious prosecution, knowing use of false and perjured testimony, deliberate suppression of exculpatory evidence and "intentional conspiracy." He seeks $6,000,000.00 compensatory and $2,000,000.00 punitive damages, as well as costs.

I

Each defendant seeks dismissal of counts 3, 2 and 4 (for purposes of convenience they will be discussed in that order) on grounds that the plaintiff is not within the class of persons protected by the provisions of the Civil Rights Act cited therein. This court agrees.

Count 3 alleges that the defendants' activities give the plaintiff a claim under 42 U.S.C. § 1985(3). In order to come within the terms of that section, however, plaintiff must allege that the defendants did (1) "conspire or did go in disguise on the highway or on the premises of another" and (2) did so "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws." *Griffin v. Breckinridge*, 403 U.S. 88, 102-103 (1971). Count 3, however, is devoid of any such allegations.

Indeed, the basis of count 3 is that the plaintiff as an *individual* was singled out for harm by these defendants because of his "militant republicanism" as opposed to any allegation that the defendants' activities were based upon racial or "otherwise class based invidiously discriminatory animus." 402 U.S. at 102; *Bricker v. Crane*, 468 F. 2d 1228, 1323-33 (1st Cir. 1972). *See Hughes v. Ranger Fuel Corporation*, 467 F. 2d 2 (4th Cir. 1972).

Count 2 also fails to state a claim on which relief can be granted. It alleges that the defendants conspired to obstruct justice in order to deprive the plaintiff of equal protection of the laws in violation of 42 U.S.C. § 1985(2). The courts which have faced the question, however, have recognized that 1985(2) and 1985(3) are "kindred sections of a common statutory scheme" (*Phillips v. Singletary*, 350 F. Supp. 297, 302 (D.S.C. 1972) and that racial or class-

based discrimination is a condition precedent to invoking either provision. *Kerckhoff v. Kerckhoff*, 369 F. Supp. 1165, 1166 (E.D. Mo. 1974); *McIntosh v. Garofalo*, 367 F. Supp. 501, 505 (W.D. Pa. 1973); *Boulware v. Battaglia*, 327 F. Supp. 368, 371 (D. Del. 1971); *Kitchen v. Crawford*, 326 F. Supp. 1255, 1261-62 (N.D. Ga. 1970), *aff'd*, 442 F. 2d 1345 (5th Cir.), *cert. denied*, 404 U.S. 956 (1971). Accordingly, Count 2 must also be dismissed.

Count 4 alleges a claim under 42 U.S.C. § 1986. That section creates an additional cause of action for refusal to take affirmative action in certain circumstances to prevent the commission of an act giving rise to a claim under § 1985. No claim lies under § 1986, however, except on the basis of a valid claim under § 1985. *Johnston v. National Broadcasting Co., Inc.*, 356 F. Supp. 904(E.D. N.Y. 1973); *Post v. Payton*, 323 F. Supp. 799 (E.D. N.Y. 1971); *Huey v. Barlogov*, 277 F. Supp. 864 (N.D. Ill. 1967). Because the amended complaint does not state a valid claim under § 1985 it cannot state one under § 1986. For that reason Count 4 must also be dismissed.

II

Count 1 alleges that the defendants deprived the plaintiff of his civil rights in violation of 42 U.S.C. § 1983. Section 1983 is broader in scope than section 1985 in that it affords protection against violation of any rights secured by the Constitution, not merely those stemming from racial or other types of class-based discrimination. *Hoffman v. Halden*, 268 F. 2d 280, 293-94 (9th Cir. 1959); *Daly v. Federson*, 278 F. Supp. 88, 91 (D. Minn. 1967).[5] Section 1983, however, is not so broad as to allow a plaintiff to escape a motion to dismiss merely by alleging that "defendant's conduct deprived plaintiff of his con-

stitutional rights." *Snowden v. Hughes*, 321 U.S. 1, 10 (1944); *Powell v. Jarvis*, 460 F. 2d 551, 553 (2d Cir. 1972); *Moran v. Bench*, 353 F. 2d 193 (1st Cir. 1965); *Dunn v. Gazzola*, 216 F. 2d 709, 711 (1st Cir. 1954); *Yglesias v. Gulfstream Park Racing Ass'n*, 201 F. 2d 817 (5th Cir. 1953). The complaint must also allege *facts* which support its allegations and which, if believed, would show (1) that the defendant was acting under color of state law and (2) that his conduct deprived the plaintiff of a right which is actually protected by the constitution. *See El Mundo Inc. v. Puerto Rico Newspaper Guild, Local 225*, 346 F. Supp. 106, 113 (D.P.R. 1972); *Daly v. Pedersen*, 278 F. Supp. 88, 94 (D. Minn. 1967). *See also Valley v. Maule*, 297 F. Supp. 958, 960-61 (D. Conn. 1968). *Compare Monroe v. Pape*, 365 U.S. 167 (1961) *with Griffin v. Breckenridge*, 403 U.S. 88 (1971). As the court noted in *McGuire v. Todd*, 198 F. 2d 60 (5th Cir. 1953):

> It is sufficient for us in this case to say: that, as other courts have done, we disregard, as mere conclusions, the loose and general, the factually unsupported, characterizations of the complained of acts of defendants, as malicious, conspiratorial, and done for the purpose of depriving plaintiffs of their constitutional rights; that [if] *the things defendants are alleged to have done*, as distinguished from the conclusions of the pleadings with respect to them, do not constitute a deprivation of the civil rights of plaintiffs [they] do not give rise to the cause of action claimed. . . .

198 F. 2d at 63 (emphasis supplied).

In the instant case, the charges against the individual defendants vary. Out of necessity, therefore, the court will examine the things which each defendant is alleged to have

done in order to determine whether the allegations against that defendant are sufficient to survive the pending motions. *See Symkowski v. Miller*, 294 F. Supp. 1214 (E.D. Wisc. 1969).

JOHN J. RYAN

The complaint alleges that Ryan (1) held a hearing on the Rockland application for the purpose of airing false charges made against the plaintiff; (2) permitted testimony at that hearing which he knew to be false; and (3) gave false testimony to the Suffolk County Grand Jury when that body was investigating charges against the plaintiff.

Assuming *arguendo* that Ryan's activities were done under color of state law,[6] plaintiff has not cited, nor has this court found, authority for the proposition that the convening of an administrative hearing by a Commissioner of Insurance under these circumstances violated plaintiff's civil rights. The hearing was not called to initiate action against plaintiff. No charges were filed against him, nor was his name mentioned at any stage in the proceedings. *Compare Goldberg v. Kelley*, 379 U.S. 254 (1970). The fact that the practical impact of the hearings was to increase public awareness of activities which were later attributed to plaintiff, does not amount to a violation of plaintiff's constitutional rights.

Moreover, there was ample cause for Ryan to convene the hearing. *See Pierson v. Ray* 386 U.S. 547 (1966) (probable cause may offer a defense for public officials sued for their official actions under 1983). Following a ruling by the Supreme Judicial Court (*Rockland Mutual Insurance Co. v. Comm. of Ins.*, [1971] Mass. Adv. Sh. 1883, 277 N.E. 2d 493) Ryan was required to hold a full hearing and develop a "complete and informative record" before making a decision on the Rockland application.

277 N.E. 2d at 499. In compliance with that mandate, Ryan had already held one hearing on the application in January, 1972, after which he had made a tentative decision to grant the application. In mid-March, however, charges against plaintiff and Kirk came to his attention. At the very least, he then had to determine what effect, if any, those charges might have on his final decision. And, as a practical matter, he had to make that determination on the basis of some sort of public record. In view of these considerations, this court cannot conclude that Ryan abused his official discretion or otherwise violated plaintiff's civil rights.

Plaintiff next charges that Ryan "raised no protest" when Cowin testified falsely at the Commissioner's March hearing. Here again the plaintiff has not cited any authority for the proposition that this alleged nonfeasance rises to the level of a violation of constitutional rights. Nor has the plaintiff explained why the defendant in this situation should be subject to civil liability. The integrity of the fact-finding process was amply protected by the opportunity for Ryan to weigh the evidence before him and report possible irregularities to the Attorney General.

Moreover, neither the complaint nor the plaintiff's supporting affidavits specify those statements of Cowin's which were allegedly false.[7] *See French v. Corrigan*, 432 F. 2d 1211 (7th Cir. 1970) (allegations of false testimony must be pleaded with particularity).

Finally, plaintiff alleges that Ryan perjured himself before the Grand Jury, although here too he fails to cite what portions of Ryan's testimony were false. Even if this allegation had been pleaded with particularity, however, it would also fail to state a claim under section 1983.

Under Massachusetts law, a witness who gives false testimony before a grand jury is liable in a criminal action

for perjury. Mass. Gen. Laws. Ann. ch. 268, § 1. He is not, however, liable for the same testimony in a civil suit since testimony in a judicial proceeding is privileged against defamation suits as a matter of public policy. *Aborn v. Lipson*, 357 Mass. 71, 256 N.E. 2d 442 (1970); *Mezullo v. Maletz*, 331 Mass. 233, 118 N.E. 2d 356 (1954). That same public policy also proscribes civil liability for false testimony under § 1983. *Bryant v. Commonwealth of Kentucky*, 490 F. 2d 1273 (6th Cir. 1974).

WILLIAM I. COWIN

The allegations against Cowin are listed chiefly in paragraphs 24-35 of the amended complaint. Essentially he is charged with: (1) damaging the plaintiff's reputation by testifying falsely before Ryan as well as preparing an inaccurate report on the Berman Miller allegations to Sargent; and (2) testifying falsely before the Suffolk County Grand Jury.

The first set of allegations represents a claim for defamation. Section 1983, however, does not provide a remedy for defamation claims. *Gorman v. Lukowsky*, 431 F. 2d 971 (6th Cir. 1970); *Heller v. Roberts*, 386 F. 2d 832 (2d Cir. 1967). *Cf. Bell v. Hood*, 327 U.S. 678 (1946); *Yglesias v. Gulfstream Park Racing Ass'n*, 201 F. 2d at 818.

The second set of allegations represents an allegation of perjury. As mentioned above, 1983 provides no remedy for that type of claim *Bryant v. Commonwealth of Kentucky*, 490 F. 2d 1273 (6th Cir. 1974).

FRANCIS W. SARGENT

The complaint alleges that Sargent, having received information concerning "a shakedown attempt by plain-

tiff" (Amended Complaint ¶29), requested the official who first reported the incident to him to conduct an investigation (¶¶26-27); and that after receiving the report, Sargent forwarded it to the Attorney General. The complaint alleges that by his actions Sargent harmed the plaintiff's reputation and instigated criminal prosecution by the Attorney General.

The allegations against the Governor make out possible claims for defamation and malicious prosecution. Neither, however, are actionable under the Civil Rights Act. *Curry v. Ragan*, 257 F. 2d 449 (5th Cir.), *cert. denied*, 358 U.S. 851 (1958); *Yglesias v. Gulfstream Park Racing Ass'n*, 201 F. 2d 817 (5th Cir. 1953). *See Monroe v. Pape*, 365 U.S. 167, 240 n. 68 (1961) (Frankfurter, J.). Indeed, plaintiff is arguing that a Chief Executive, made aware of possible wrong doing, should keep the matter away from the prosecutor and attempt to deal with it himself. Both common sense and painfully recent history make it unlikely that 1983 can be, or should be, extended that far.

ROBERT H. QUINN
JOHN J. IRWIN
HARVEY F. ROWE

Plaintiff alleges that these defendants deprived him due process by: (1) maliciously instituting criminal proceedings against him; (2) deliberately using false and perjured testimony in state criminal proceedings against him; and (3) deliberately suppressing exculpatory evidence in the course of these proceedings.

A charge of malicious prosecution does not state a claim under the Civil Rights Act. *See, e.g., Yglesias v. Gulfstream Racing Ass'n*, 201 F. 2d 817 (5th Cir. 1953). Even if such a claim were cognizable, however, the facts alleged in this complaint are not sufficient to survive a motion for

summary judgment.

The gravamen of the plaintiff's allegation against the prosecutors is that in the course of their investigation, they developed "serious contradictions" in Berman's story. Plaintiff argues that these contradictions required the defendants to conclude that there was no probable cause on which to proceed against the plaintiff. This course disagrees.

Plaintiff's characterization of the evidence developed during investigation as contradictory impliedly acknowledges that the state investigators had uncovered inculpatory evidence. Thus the plaintiff is really arguing that prosecutors, faced with conflicting evidence, are constitutionally required to disregard incriminating evidence and resolve all doubts in favor of the plaintiff. Unless a prosecutor knows inculpatory testimony to be false, the Fourteenth Amendment makes no such demand. *Napue v. Illinois*, 360 U.S. 264 (1959); *United States v. McGovern*, 499 F. 2d 1140, 1143 (1st Cir. 1974); *Conner v. Deramus*, 374 F. Supp. 504 (M.D. Pas. 1974) *Ray v. Ross*, 371 F. Supp. 277 (E.D. Tenn. 1974). *Cf. United States v. Cox*, 342 F. 2d 167 (5th Cir. 1965) (en banc).

Moreover, the allegations of the complaint show that a grand jury found probable cause to indict Mr. Hahn. Viewing this factor against the background of the "prevailing view of tort law," *(see Pierson v. Ray*, 386 U.S. 547, 555 (1966)), such a finding affords these defendants a complete defense to a malicious prosecution claim. *See* Annotation, Malicious Prosecution: Effect of Grand Jury, Indictment on Issue of Probable Cause, 28 A.L.R. 3d 748.

Plaintiff's second allegation against these defendants is that they knowingly procured perjured testimony in presenting the Commonwealth's case to the Grand Jury. The complaint, however, sets out neither the contents of the allegedly perjured testimony, nor the basis for the de-

fendant's belief that any of it was false. Absent such factual allegations, the complaint contains only self-serving characterizations and conclusions which are insufficient to survive a motion for summary judgment.[8] *Powell v. Jarvis*, 460 F. 2d 551, 552 (2d Cir. 1972); *Symkowski v. Miller*, 294 F. Supp. 1214, 1216-17 (E.D. Wisc. 1969).

The final claim against the Attorney General and his assistants is that they deliberately withheld exculpatory evidence relevant to the plaintiff's criminal trial.[9] *See Brady v. Maryland*, 373 U.S. 83 (1963). Assuming arguendo that evidence was withheld at the trial and that such evidence was indeed exculpatory, the allegations in this complaint show no violation of due process.

According to the complaint, the information which the plaintiff alleges was withheld was made available to the plaintiff nine days before the trial was completed. During that period, plaintiff and his counsel "had the use, knowledge and probative value of these reports for cross-examination of defendant Berman as well as for examination of other witnesses "(Amended Complaint ¶43). And, of course, plaintiff was acquitted of all charges against him. Accordingly, he has failed to show any prejudice or due process violation resulting from the defendant's alleged actions. *See United States v. McGovern*, 490 F. 2d 1140 (1st Cir. 1974); *United States v. Principe*, 490 F. 2d 1135 (1st Cir. 1974).

WENDELL BERMAN
ALAN G. MILLER
ALEX PRASINOS

Defendants Berman, Miller and Prasinos are named in the complaint presumably because of their alleged fabrication and dissemination of a false story accusing the plaintiff of an attempted shakedown. The plaintiff, how-

ever, has not alleged facts which show that the actions of any of these defendants were either done under color of state law (see *Adickes v. Kress & Co.*, 398 U.S. 144, 150 (1970); *United States v. Price*, 383 787, 793, 794 (1966); *Monroe v. Pape*, 365 U.S. 167, 184, 187 (1961)) or involved violations of *federally* protected rights. *See Yglesias v. Gulfstream Park Racing Ass'n*, 201 F. 2d 817 (5th Cir. 1953). Accordingly, plaintiff has failed to state a claim against these defendants.

III

Finally, the plaintiff alleges that the individual defendants conspired to deprive him of his constitutional rights in violation of 42 U.S.C. § 1983. *See Birnbaum v. Trussell*, 371 F. 2d 672 (2d Cir. 1966); *Hoffman v. Halden*, 268 F. 2d 280 (9th Cir. 1959); *Ames v. Vavreck*, 356 F. Supp. 931 (D. Minn. 1973). He does not make clear whether all the defendants were part of one conspiracy or whether a series of conspiracies involving different groups of defendants were allegedly operating simultaneously.[10]

In analyzing conspiracy claims, courts must be cautious in labeling allegations of conspiracy as mere conclusions. *Moran v. Bench*, 353 F. 2d 193, 195 (1st Cir. 1965); *Hoffman v. Halden*, 258 F. 2d 280, 294 (9th Cir. 1959). "Nevertheless, by the bare use of the word 'conspiracy' with no supporting facts that tend to show the existence of an unlawful agreement of prima facie improper behavior, plaintiff [cannot meet] the burden of countering affidavits making explicit denials [of these allegations]." 353 F. 2d at 195. *See also Bryant v. Commonwealth of Kentucky* 490 F. 2d 1273 (6th Cir. 1974) *Scolnick v. Lefkowitz*, 359 F. 2d 716 (2d Cir.) *cert. denied*, 379 U.S. 825 (1964); *Dunn v. Gazzola*, 216 F. 2d 709, 711 (1st Cir. 1954).

In the face of defendant's affidavits denying that a conspiracy existed here, plaintiff's complaint clearly fails that test. It alleges only that the defendants cooperated or "acted in concert" to harm the plaintiff in order to serve their own disparate aims. No facts are alleged which show that (1) a combination or agreement among any of the defendants was actually formed at any time or (2) that any of the defendants acted knowingly or willingly in furtherance of that agreement. Indeed, at oral argument before this court, the defendant maintained that it was sufficient to make out a conspiracy claim merely if the combined effect of the individual actions of the parties was harm to the plaintiff. Such an argument is without merit.

In conclusion then, this court holds that the plaintiff has failed to state a claim upon which relief can be granted against any of the named defendants. Defendants' motions to dismiss counts 2 through 4 and for Summary Judgment as to count 1 are therefore allowed.[11]

SO ORDERED.

J. H. TAURO
United States District Judge

FOOTNOTES

1. There is some confusion in the record as to Mr. Berman's position. At this stage in the proceedings, the court accepts the factual allegations of the complaint on this and other points as true.

2. At an earlier hearing, the plaintiff moved to amend his complaint after some of the defendants had moved to dismiss. The court allowed plaintiff's motion to amend (Fed. R. Civ. P. 15(a)), but then rescheduled the hearing in order to give the defendants additional time to consider their motions in light of the amended complaint. In the period between the hearings, the pending motions were filed.

3. There is no indication that the Commissioner's decision resulted from plaintiff's intervention. Indeed, a review of the uncontradicted Grand Jury Testimony of Commissioner Ryan reveals that the decision on the Rockland application had been made before plaintiff contacted Mr. Ryan.

4. A previous set of hearings had been held in January, 1972.

5. Nor does section 1983 require a showing of conspiracy, although a conspiracy to violate section 1983 is actionable under the statute. *See, e.g., Birnbaum v. Trussell*, 371 F. 2d 672 (2d Cir. 1966); *Hoffman v. Halden*, 268 F. 2d 280 (9th Cir. 1959); *Ames v. Vavreck*, 356 F. Supp. 931 (D. Minn. 1973).

6. This court will also assume *arguendo* as well that the alleged activities of defendants Cowin, Sargent, Quinn, Irwin and Rowe were done under color of state law. *See Wall v. King*, 206 F. 2d 878 (1st Cir. 1953).

7. Plaintiff mentions Cowin's testimony about a

March 3 meeting with Miller and Ryan. At the hearing, Cowin testified as to his impression of Miller's mood at the March 3 meeting ("upset") as well as to his own, Cowin's, characterization of Rockland as an "innocent victim" which was also made at that time. Plaintiff alleges that Cowin's testimony as to his earlier characterization of Rockland was false and that *Ryan* knew that testimony was false. The alleged basis for Ryan's knowledge, and therefore plaintiff's claim against him, is that when Ryan testified about this same meeting before the Grand Jury, he made no mention of Cowin's characterization. Ryan's uncontradicted affidavit as well as a certified transcript of his Grand Jury testimony reveal, however, that Ryan was never asked about how Cowin had characterized Rockland at the March 3 meeting.

8. It is worthy of note that the plaintiff had access to the Grand Jury testimony both prior to and during his trial. According to the uncontradicted affidavit of defendant Rowe, neither the plaintiff nor his counsel called the trial judge's attention to any testimony which was allegedly false.

9. The defendants argue that because of various rulings by the state trial court, the plaintiff is now barred by principles of collateral estoppel from claiming that evidence which was allegedly withheld at the earlier proceedings was exculpatory. *Mastracchio v. Rico*, No. 74-1045 (1st Cir. June 24, 1974). In view of this court's disposition of the exculpatory evidence claim, there is no occasion to rule on this point. Of course, had such a ruling been necessary, this court would have been required to "examine the record of the antecedent case" in order to determine what points had been litigated and adjudicated there. That record,

however, has not been introduced by any party. *See Carillo v. Zyla*, 486 F. 2d 473 (1st Cir. 1973).

10. Private persons who would not be liable under section 1983 if acting alone, come within this section's purview once they conspire with others who clearly are acting under color of state law. *Gillibeau v. City of Richmond*, 417 F. 2d 426 (9th Cir. 1969); *Luker v. Nelson*, 341 F. Supp. 111 (N.D. Ill. 1972).

11. In memoranda accompanying their motions, defendants Ryan, Cowin, Sargent, Quinn, Irwin and Rowe discuss at some length the common law doctrine of executive immunity and its possible application to this case. In view of this court's holding, there is no occasion to consider the immunity defense as such. Of course, the application of that defense to 1983 claims against state executive officials has yet to be "definitively explored" by the Supreme Court. *Scheuer v. Rhodes*, 42 U.S.L.W. 4543, 4548 (U.S April 17, 1974).

APPENDIX C

COUNT 1. In violation of Title 42 United States Code, Section 1983, defendants Sargent, Cowin, Ryan, Quinn, Irwin and Rowe or each of them, with defendants Berman, Miller and Prasinos in concert with them and with each other, all defendants acting generally under the color of the laws, customs and usages of the Commonwealth of Massachusetts; and more especially under the color of the offices of Governor, Attorney General, Secretary of Consumer Affairs and Commissioner of Insurance and the customs and usages thereof; and under the color of the Suffolk County Grand Jury, the Suffolk Superior Court and the Supreme Judicial Court and the customs and usages thereof; by doing or causing to be done the acts described in paragraph 4 through and including paragraph 67(e) above which are adopted herein by reference, subjected plaintiff or caused plaintiff to be subjected, because of politics or otherwise, to the deprivation of his rights, privileges and immunities secured by the Constitution and laws of the United States and of equal protection thereof, namely, the right to engage in the political process and the right to due process of law, which rights include freedom from malicious prosecutions, freedom from knowing use of suspect, false or perjured testimony, freedom from deliberate suppression of exculpatory evidence and freedom from intentional conspiracy, all in violation of the First Amendment and the Fourteenth Amendment to the Constitution of the United States, and in violation of such laws customs and usages of the United States as are incorporated in the due process clause and in the equal protection clause of said Fourteenth Amendment.

COUNT 2. In violation of Title 42 United States Code, Section 1985(2), the defendants did conspire for the purpose of impeding, hindering, obstructing or defeat

ing the due course of justice with the intent of denying to plaintiff the equal protection of the Constitution and laws of the United States and did or caused to be done the acts described in paragraph 4 through and including paragraph 67(e) above which are incorporated herein by reference, whereby plaintiff, because of politics or otherwise, was denied certain rights, privileges and immunities secured by the Constitution and laws of the United States and of equal protection thereof, namely the right to engage in the political process and the right to due process of law, which rights include freedom from malicious prosecution; freedom from knowing use of suspect, false or perjured testimony; freedom from deliberate suppression of exculpatory evidence and freedom from intentional conspiracy; all as guaranteed to the Constitution and laws of the United States and more particularly as guaranteed by the First Amendment to the Fourteenth Amendment to the Constitution of the United States, and such laws, customs and usages of the United States as are incorporated in the due process clause and in the equal protection clause of the Fourteenth Amendment.

(2) In violation of Title 42 United States Code, Section 1985(3), the defendants or some of them did conspire for the purpose of depriving plaintiff directly or indirectly of equal protection of the Constitution and laws of the United States and of equal privileges and immunities under the Constitution and laws of the United States, and did or caused to be done the acts described in paragraph 4 through and including paragraph 67(e) above which are incorporated herein by reference, whereby plaintiff, because of politics or otherwise, was deprived of equal protection of and equal privileges and immunities under the Constitution and laws of the United States, namely, the right to engage in the political process and the

right to due process of law, which rights include: freedom from malicious prosecution; freedom from knowing use of suspect, false or perjured testimony; freedom from intentional conspiracy; freedom from deliberate suppression of exculpatory evidence; all in violation of the First Amendment and the Fourteenth Amendment to the Constitution of the United States and in violation of such laws, customs and usages of the United States as are incorporated in the due process clause and in the equal protection clause of said Fourteenth Amendment.

COUNT 4. In violation of Title 42 United States Code, Section 1986, the defendants or some of them, having knowledge or the means of knowing that the wrongs to plaintiff described in paragraph 4 through and including paragraph 67(e) above which are adopted herein by reference, were conspired to be done and having knowledge or the means of knowing when the wrongs to plaintiff were about to be done, and having the power under the Constitution and laws of the Commonwealth of Massachusetts to prevent or aid in preventing the commission of said wrongs to plaintiff, said defendants neglected or refused to prevent or aid in preventing the commission of said wrongs to plaintiff, whereby such wrongs to plaintiff were committed, which the defendants by reasonable diligence could have prevented, namely, the deprivation to plaintiff, because of politics or otherwise, of equal protection of and equal privileges and immunities under the Constitution and laws of the United States, namely, the right to engage in the political process and the right to due process of law, which rights include: freedom from malicious prosecution; freedom from knowing use of suspect, false or perjured testimony; freedom from deliberate suppression of exculpatory evidence and freedom from intentional conspiracy; all in violation of the First Amend-

ment and the Fourteenth Amendment to the Constitution of the United States, and in violation of such laws, customs and usages of the United States as are incorporated in the due process clause and in the equal protection clause of said Fourteenth Amendment.

WHEREFORE, plaintiff alleges that as the direct consequence and result of the acts of defendants hereinbefore complained of, plaintiff was put under a cloud; suffered impairment to his reputation; lost the position of Massachusetts Republican State Chairman; was eliminated as a factor in the Republican Party of Massachusetts; was adversely affected in his right to engage in the political process in Massachusetts; suffered damage to his law practice; suffered the humilitation of indictment, surrender, booking, arraignment and trial; suffered the effects of adverse news reports and editorial comment; suffered anxiety and distress as to his family and as to himself; suffered loss of income; and was required to expend substantial funds for legal defense; and

APPENDIX D

United States District Court
District of Massachusetts

ROBERT C. HAHN,

Plaintiff,

vs.

FRANCIS W. SARGENT, et al.,

Defendants.

CIVIL ACTION NO. 74-1908-T

AFFIDAVIT OF PLAINTIFF ROBERT C. HAHN RELATIVE TO DEFENDANT SARGENT

ROBERT C. HAHN, the plaintiff herein, countering the Affidavit of defendant Francis W. Sargent referred to below, on oath deposes and says as follows:

1. The issues as to whether or not defendant Sargent personally or through a subordinate or agent received a cash contribution or any other contribution from defendant Berman while he was acting Governor or Governor cannot be resolved by affidavit, but must be tried (see portion of transcript testimony of Wendell Berman before the Suffolk Superior Court on 25 February 1974, attached hereto and marked "A").
2. The remaining issues raised by defendant Sargent in his Affidavit are also triable issues, inasmuch as they necessarily involve the taking of evidence and the

drawing of conclusions from such evidence.

3. Plaintiff affirms his certification based on knowledge and belief appended to his Amended Complaint, as to all allegations contained therein, including those allegations relevant to the issues raised by defendant Sargent in his Affidavit referred to above, which are adopted by reference and made a part hereof.
4. Plaintiff intends to offer evidence at trial in support of the allegations contained in his Amended Complaint, including plaintiff's testimony referred to in his Amended Complaint relevant to the issue of cash contribution, as well as the Berman testimony referred to in Exhibit A, attached hereto.

ROBERT C. HAHN

The Commonwealth of Massachusetts

SUFFOLK, SS. 13 December 1974

Personally appeared before me, the above named ROBERT C. HAHN who signed the foregoing Affidavit and swore to its truth.

KAREN T. BUONOSARO, **Notary Public**
My Commission Expires 1 Sept. 1978

WENDELL BERMAN, Recalled
CROSS EXAMINATION, Resumed
BY MR. SULLIVAN:

THE CLERK. Mr. Berman, you are still under oath.

RECROSS EXAMINATION, Cont'd.
BY MR. SULLIVAN:

Q. Very briefly, sir, you testified to Mr. Hurley on cross examination that you gave Governor Sargent somewhere between $3,000 and $3,500. Is that correct?

MR. ROWE. Your Honor, I am going to object to this asking of the question over again. I think it has been asked of the witness a number of times.

THE COURT. I will agree that it has, but he may have it.

Go ahead.

A. Will you repeat the question?

Q. Do you recall telling Attorney Hurley on cross examination that you gave Governor Sargent approximately $3,000 or $3,500?

A. I do.

Q. Was that all during the calendar year of 1970?

A. I can't remember the exact dates.

Q. Was it all in cash?

A. Yes, sir.

Q. Was it all your money?

A. Yes, sir.

Q. Can you give us a better estimate of the amount between $3,000 and $3,500?

A. No, sir.

Q. Was it all given by you personally to Governor Sargent?

A. Yes, sir.

MR. ROWE. I object as to relevance on this line of questioning.

THE COURT. All right, I have noted your objection. It is overruled.

Go ahead.

Q. Was it all given by you to Governor Sargent with regard to a single campaign of his?

A. I can't be sure of that.

CERTIFICATE

I, Harry J. McKenna, Official Court Reporter, do hereby certify that the foregoing is a true and accurate transcript in the proceedings of Commonwealth versus Robert C. Hahn and James Kirk in Suffolk Indictment No. 67157, before Justice HAYER, on Monday, February 25, 1974.

HARRY J. McKENNA
Official Court Reporter

APPENDIX E

United States District Court
District of Massachusetts

ROBERT C. HAHN,

Plaintiff,

vs.

FRANCIS W. SARGENT, et al.,

Defendants.

CIVIL ACTION NO. 74-1908-T

AFFIDAVIT OF PLAINTIFF ROBERT C. HAHN RELATIVE TO DEFENDANTS COWIN AND RYAN

ROBERT C. HAHN, the plaintiff herein, countering the Affidavits referred to below, on oath deposes and says as follows:

A. As to the Affidavit of defendant John G. Ryan, dated August 23, 1974;

1. A review of the Amended Complaint reveals that plaintiff does not allege that defendant Ryan, or the witnesses or other participants in the alleged so-called hearing on 31 March 1972, mentioned plaintiff's name; rather plaintiff alleges that defendant Ryan in concert with defendants Cowin, Miller and others, through the device of the so-called hearing, deliberately created a media event, which would instigate public and private specula-

tion and investigation that would lead to the identity of plaintiff.

2. The issue as to whether defendant Ryan knowingly gave false testimony cannot be resolved by affidavit, but only by trial.

B. As to the Affidavit of defendant William I. Cowin, dated August 26, 1974:

1. The issue as to whether or not defendant Cowin had a meeting with defendant Berman on or about 10 March 1972, cannot be resolved by affidavit, but must be tried (see portion of transcript testimony of James G. Kirk before the Suffolk Superior Court on 1 March 1974, attached hereto and marked "A").
2. Inasmuch as the issue described in the foregoing paragraph B-1 is a triable issue, then it follows that the issues raised by defendant Cowin in paragraphs 4, 5 and 6 of his Affidavit are also triable issues.
3. The issue raised by defendant Cowin in paragraph 7 and 9 of his Affidavit is also a triable issue (see plaintiff's Affidavit, paragraph A-1 above).
4. The issues as to whether defendant Cowin learned of exculpatory evidence during his so-called investigation, or whether he knowingly gave false testimony, cannot be resolved by affidavit, but only by trial.

C. Plaintiff affirms his certification based on knowledge and belief appended to his Amended Complaint, as to all allegations contained therein, including those allegations relevant to the issues raised by defendants Cowin and Ryan in their respective Affidavits referred to above.

D. Plaintiff intends to offer evidence at trial in support of the allegations contained in his Amended Complaint, including the Kirk testimony referred to in Exhibit A, attached hereto.

E. Plaintiff further states as follows:

1. Plaintiff, to his best memory, made only two phone calls to defendant Ryan in February and March 1972. The first call was to set up his first meeting with defendant Ryan in late February 1972. The second phone call was to defendant Ryan the morning of 2 March 1972 at defendant Ryan's request. Plaintiff's secretary, at plaintiff's request, made one phone call to defendant Ryan on or about 29 February 1972, to inform him that plaintiff would be in Washington for two days. Defendant Ryan asked her to have plaintiff call him on his return.
2. Plaintiff categorically denies making any other phone calls to defendant Ryan during said months of February and March 1972, either from Boston, Washington or any other location.
3. Plaintiff again says however, that the issue of these phone calls, as other issues, cannot be resolved by affidavit, but only by trial.

ROBERT C. HAHN

The Commonwealth of Massachusetts

SUFFOLK, SS. 4 December 1974

Personally appeared before me, the above named ROBERT C. HAHN, who signed the foregoing Affidavit and swore to its truth.

KAREN T. BUONASARO, Notary Public
My Commission Expires 1 Sept. 1978

MR. HURLEY. I will call Mr. Kirk, your Honor.

JAMES W. KIRK, Sworn
DIRECT EXAMINATION
BY MR. HURLEY:

you had that talk with Mr. Hahn about reporting that?

A. I think it was approximately March 10th.

Q. Did you discuss with Mr. Berman this matter, the Lampert seawall damage?

A. Yes, I did.

Q. When?

A. I believe it was approximately the week of the 5th

Q. I am sorry.

A. Approximately the week of the 5th of March, somewhere in there. I think it was approximately on the 10th.

Q. I am sorry.

A. Approximately on the 10th of March.

Q. Where did you have this discussion with Mr. Berman?

A. I had it, I had the discussion in his office.

Q. What did he say to you and what did you say to him?

A. Well, I told him at that time that the seawall case that his nephew had apparently was not litigatious in any way. That his nephew could put in a claim through the Selectmen and that this was going to be declared a disaster area, according to Bob Hahn.

At that point, Mr. Berman started talking about a conversation he had with Bill Cowin.

Q. Did he tell you when he had that conversation with Mr. Cowin?

A. He said he had had it that day.

Q. Did he indicate to you the substance of that conversation?

A. Yes.

Q. What did he say was the substance of that conversation, what it was?

A. He said he had been up to see Bill Cowin, and I asked him why? He said he was unhappy with the conditions.

Q. All right.

A. That he talked to him about it, that he talked about the Board of Directors. When it came to mentioning names about who was going on the Board of Directors, he mentioned my name.

Q. Wendell Berman told you on March 10th that this was his conversation with Cowin?

A. That's right.

Q. What else did he relate concerning his conversation with Mr. Cowin?

A. He said that Mr. Cowin, when he mentioned my name was going on the Board of Directors, he said, "Kirk", and he said, "Who is Kirk?" He said, "He is a friend of Bob Hahn's."

Q. Berman said that to Cowin?

A. That's right. Berman said to Cowin, "He is a friend of Bob Hahn's."

Q. What next was said?

A. When he said that to him, he said, "Well, I wouldn't want him on the Board." He further said he had mentioned another name to go on, and it was the name Tucker that he suggested go on the Board. Mr. Berman was upset over that.

Q. What else did he relate to you concerning his conversation with Mr. Cowin?

A. He said that he had been asked by Mr. Cowin to give a signed statement as to the relationship between Mr. Hahn and himself insofar as this matter was concerned, and he said, "I refused to do it." I said to him, "Why did you do that? Why didn't you give it to him?" He said, "Well, I preferred to have my lawyer with me." I said, "Well, that's up to you."

That was about the end of the conversation.

Q. On that day did you have any talk with Mr. Hahn?

A. I did.

Q. Was that in person or by telephone?

A. By telephone.

Q. Where did you reach him?

A. I reached him at his office.

CERTIFICATE

I, Harry J. McKenna, Official Court Reporter, do hereby certify that the foregoing is a true and accurate transcript in the proceedings of Commonwealth versus Robert C. Hahn and James W. Kirk in Suffolk Indictment No. 67157, before Justice HAYER, on Friday, March 1, 1974.

HARRY J. McKENNA
Official Court Reporter

APPENDIX F

United States District Court
District of Massachusetts

ROBERT C. HAHN,

Plaintiff,

vs.

FRANCIS W. SARGENT, et al.,

Defendants.

CIVIL ACTION NO. 74-1908-T

AFFIDAVIT OF PLAINTIFF ROBERT C. HAHN RELATIVE TO DEFENDANTS QUINN, IRWIN AND ROWE

ROBERT C. HAHN, the plaintiff herein, countering the Affidavit of defendant Harvey F. Rowe, Jr., referred to below, on oath deposes and says as follows:

1. A review of the Amended Complaint reveals that plaintiff at trial did in fact point out contradictions in defendant Prasinos' and in defendant Berman's testimony which led the Court in each instance to examine the file of defendants Quinn, Irwin and Rowe, in which the Court found contradictory and exculpatory material, which the Court ordered turned over to plaintiff's counsel, and which material, on a fair reading, strongly suggests the prosecution had in fact made use of false, sus-

pect or perjured testimony, which material speaks for itself.

2. Plaintiff categorically asserts that defendants Quinn, Irwin and Rowe, on the issue of exculpatory evidence in their possession, deliberately misled both plaintiff and the Court, and thereby committed a fraud both on the Court and on plaintiff, and by their own conduct on that point alone, are estopped from claiming the benefit of collateral estoppel as to probable cause or as to any other issue, including the defense of immunity. (See portion of transcript remarks of defendant Rowe on 19 February 1974 on which emphasis has been supplied and which is attached hereto and marked "A").
3. Plaintiff affirms his certification based on knowledge and belief appended to his Amended Complaint, as to all allegations contained therein, including those allegations relevant to the issues raised by defendant Rowe in his Affidavit referred to above.
4. Plaintiff intends to offer evidence at trial in support of the allegations contained in his Amended Complaint, including the Rowe remarks referred to in Exhibit A, attached hereto.

ROBERT C. HAHN

The Commonwealth of Massachusetts

SUFFOLK, SS. 4 December 1974

Personally appeared before me, the above named ROBERT C. HAHN, who signed the foregoing Affidavit and swore to its truth.

KAREN T. BUONASARO, *Notary Public*
My Commission Expires 1 Sept. 1978

Motion for Exculpatory Evidence, gentlemen.

MR. HURLEY. If your Honor please, that was one where the Commonwealth undertook to supply us with any material that came into their possession, *stating that at that time they had none. If any came into their possession, they would produce it. There has been none produced.*

I rely upon the integrity of the Attorney General that if he has any he will give it to me.

MR. ROWE. *We have no exculpatory evidence at this time.*

THE COURT. This was allowed in October 1972. Nothing has required anything other than that?

MR. HURLEY. That is right.

CERTIFICATE

I, Harry J. McKenna, Official Court Reporter, do hereby certify that the foregoing is a true and accurate transcript in the proceedings of Commonwealth versus Robert C. Hahn and James Kirk in Suffolk Indictment No. 67157, before Justice HAYER, on Tuesday, February 19, 1974.

HARRY J. McKENNA
Official Court Reporter

BLEED

APPENDIX G

"The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of government powers, such as in the selection of cases to prosecute; . . . (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused". (S.J.C. Rule DR7-103).

APPENDIX H

47. In the course of his investigation of defendant Berman's false story, defendant Quinn's investigators interviewed defendant Berman three times. From the two later interviews, defendant Quinn's investigators developed serious contradictions in defendant Berman's story, the effect of which were to support plaintiff and Kirk in most essential details: for example, when Kirk first called defendant Berman he had in fact disclosed details of defendant Ryan's thinking including the proposed conditions; when plaintiff and Kirk met with defendant Berman they had in fact disclosed further details of defendant Ryan's thinking; defendant Berman could not have told defendant Miller about his dealings with plaintiff and Kirk when he claimed he did because in fact defendant Miller had been out of town at the time; all of which, together with many other contradictions, directly contradicted defendant Berman's first interview and all of which seriously challenged the truth of his false story about plaintiff.

APPENDIX I

In The United States District Court District of Massachusetts

ROBERT C. HAHN,

Plaintiff,

vs.

FRANCIS W. SARGENT,
ROBERT H. QUINN,
WILLIAM I. COWIN,
JOHN G. RYAN,
JOHN J. IRWIN, JR.,
HARVEY F. ROWE, JR.,
WENDELL BERMAN,
ALAN G. MILLER,
ALEX PRASINOS,

Defendants.

NO. .....

MOTION FOR AN ORDER AND AN INJUNCTION TO PRESERVE EVIDENCE

The plaintiff respectfully moves this Honorable Court for a temporary restraining order and an injunction restraining the defendants, their agents, servants, attorneys, staff members or employees from destroying, secreting, altering, amending or in any other way tampering with the following described evidence, and further moves this Honorable Court for an order that all the said evidence be delivered forthwith to this Court to be held by this Court

THROUGH

pending further order of this Court, and that this Court order that the materials so delivered shall be impounded pending further order of this Court:

> All files, documents, memoranda, personal diaries, office diaries, notes, letters, tape or phonographic or other electronic recordings, transcriptions, desk calendars, logbooks, papers, exhibits, evidence, telephone records, or any and all other tangible things of any kind or description whatsoever pertaining to the so-called "Rockland Insurance Case", and the case of "Commonwealth v. Hahn and Kirk", Suffolk Superior Court Criminal No. 67157, and Robert C. Hahn and James W. Kirk in the possession of the following public officers, private persons or corporations or their agents, servants, attorneys, staff members or employees:

As reasons therefore, plaintiff states that:

1. Said documents and other tangibles in the possession of the said officers, persons and corporations are absolutely essential to the preparation of his case and to a fair and impartial trial by jury of the issues herein;
2. Files and documents of the so-called Massachusetts Crime Commission have disappeared in the past from public offices of the Commonwealth of Massachusetts.

Respectfully submitted,

Robert C. Hahn, Esq.

By his Attorneys,

READE, O'ROURKE & MARINO
61 Adams Street
Braintree, Mass. 02184
848-4280

Affidavit Pursuant to F. R. Civ. P. 65(b)

I, Robert C. Hahn, plaintiff herein, make affidavit under oath that I believe that I will suffer irreparable injury or loss or both to my right to a fair jury trial the merits of the allegations in the complaint herein unless there is granted the foregoing motion for a temporary restraining order impounding evidence and an injunction restraining the defendants from destroying, secreting, altering, amending or otherwise tampering with the evidence in this case.

As factual support for my belief, I cite the fact that certain files of the Massachusetts Crime Commission, so-called, once in the possession of certain officers of the Commonwealth of Massachusetts, disappeared without a trace from offices or the Commonwealth of Massachusetts and were forever lost to the bar of justice in Massachusetts.

Further, I state as a fact that some or all of the defendants to this lawsuit personally known to me will perceive its outcome as having a grave and negative influence upon the future course of their professional or public careers or both.

Therefore I believe all the evidence must be preserved and protected by a forthwith order of this Court.

ROBERT C. HAHN

The Commonwealth of Massachusetts

NORFOLK, SS. 28 May 1974

Then personally appeared ROBERT C. HAHN, Plaintiff, and took oath that he has prepared the foregoing Affidavit and knows the contents thereof, and that the allegations thereof are true to the best of his knowledge and belief, except as to matters stated on information and

belief, and that as to those matters, he believes them to be true.

Before me,

KAREN T. BUONASARO, Notary Public
My Commission Expires 1 Sept. 1978

Attorney's Certification Pursuant to F. R. Civ. P. 65(b)

I, Francis J. O'Rourke, Attorney for the plaintiff herein, pursuant to F. R. Civ. P. 65 (b) state as reasons for my claim that notice should not be required of the foregoing requested temporary restraining order, that the impact of the civil complaint in this case upon the professional and public careers of the various defendants herein will be perceived by some or all of them as being so grave that there is serious danger of irreparable injury not merely to the plaintiff but to the administration of justice by this Honorable Court in this case, in that sole and exclusive possession of said evidence will lead some one or more misguided zealot or threatened person to the temptation to secrete, destroy or otherwise tamper with said evidence or parts of it.

Upon full adversary hearing following notice of the motion for an injunction, the Court thereafter can deal with such issues as the defendants care to raise concerning the subjects of executive privilege, prosecutorial privilege, comity, etc., while the preserved evidence continues in the safe custody of this Honorable Court.

FRANCIS J. O'ROURKE

APPENDIX J

United States District Court
District of Massachusetts

ROBERT C. HAHN,

Plaintiff,

vs.

FRANCIS W. SARGENT, et el.,

Defendants.

C. A. No. 74-1908-T

REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION COPYING, OR PHOTOGRAPHING

Pursuant to Rule 34, the Plaintiff hereby requests production for inspection, copying, or photographing the following individual items or categories of items from each of the designated defendants or other persons not parties:

1. ROBERT H. QUINN — State Police Reports of any and all interviews with defendant Berman; raw notes in relation to the above interview of any other investigative correspondence, notes, memoranda, reports or other writings concerning the case of "Commonwealth of Massachusetts v. Robert C. Hahn and James W. Kirk"; the entire files of Commonwealth v. Hahn and Commonwealth v. Kirk; notes, memos, reports of staff meetings regarding case, whether Attorney General was

present or not, internal case dockets or logs pertaining to the case of "Commonwealth v. Robert C. Hahn and James W. Kirk", and any and all items or categories of items not described heretofore, including but not limited to files, correspondence, documents, memoranda, office diaries, "Lawyer's diaries", so-called, notes, letters, tapes, phonographic or other electronic recordings, transcriptions, desk calendars, telephone records, logbooks, and any and all other documents or writings of any kind or description whatsoever having a direct or indirect evidentiary relationship to the "Rockland Insurance Case", so-called, and the resulting criminal case of "Commonwealth of Massachusetts v. Robert C. Hahn and James W. Kirk", Suffolk Superior Court Criminal Case No. 67157, whether the same be directly in his custody or in the custody of his assistants, or investigators, clerical or other personnel in or attached to the Department of the Attorney General, Commonwealth of Massachusetts.

It is requested that the aforesaid production be made, as to the documents and things described in paragraphs 1 through 4, beginning on August 19, 1974 at the State House, Boston, Mass., at 10:00 A.M. Inspection will be made by plaintiff and his attorneys, and documents to be photocopied will be appropriately designated and segregated.

ROBERT C. HAHN

By his Attorneys,

READE, O'ROURKE & MARINO
61 Adams Street
Braintree, Mass. 02184
848-4280

CERTIFICATE OF SERVICE

I, Francis J. O'Rourke, hereby certify that on July 12, 1974, I served the defendants in this case with the aforesaid REQUEST FOR PRODUCTION by mailing a copy thereof certified mail return receipt requested postage prepaid, to Kenneth Behar, Esq., counsel for the defendants Sargent, Quinn, Cowin, Ryan, Irwin and Rowe; to Richard Kaye, Esq., counsel for the defendant Berman; to Richard Melick, Esq., counsel for the defendant Miller; and to Alex Prasinos, Esq., pro se.

FRANCIS J. O'ROURKE

APPENDIX K

HAHN & MATKOV
ATTORNEYS AT LAW

44 BROMFIELD STREET, BOSTON, MASS. 02108
TELEPHONE 542-3420

ROBERT C. HAHN
I. ALBERT MATKOV

Of Counsel
DONALD W. WHITEHEAD
ROBERT R. PARKER

15 November 1974

Honorable Joseph L. Tauro
Federal District Court
U. S. Post Office & Courthouse
Boston, Ma. 02109

RE: ROBERT C. HAHN v.
FRANCIS W. SARGENT ET AL
CIVIL ACTION NO. 74-1908-T

Dear Judge Tauro:

Inasmuch as "All Pending Motions" in the above captioned case are marked for hearing on Monday, 25 November 1974, at 2:15 P.M., we would very much appreciate being able to argue the following Plaintiff's Motions at the same time:

1. Plaintiff's Motion to Allow Amended Complaint;
2. Plaintiff's Motion for an Order and an Injunction to Preserve Evidence.

As to Plaintiff's above Motion . . . to Preserve Evidence, this originally was directed against all defendants and either was denied or let lie. In any event, we would like to renew that Motion as to defendants Sargent and Quinn only, inasmuch as both defendants are about to leave their respective public offices, and we therefore think the thrust of Plaintiff's Motion (to preserve and impound evidence) becomes particularly apt.

Accordingly we respectfully ask that you might re-hear that Motion on that basis.

Much obliged for your courtesy,

Sincerely,

ROBERT C. HAHN
Co-Counsel for Plaintiff

APPENDIX L

MATTHEW BROWN
ALFONSO P. RUDNICK
SIDNEY FREED
HENRY GESMER
EDWARD SCHNEIDER
AARON J. BRONSTEIN
MARVIN N. GELLER
JOSHUA A. GUBERMAN
ALAN H. CALECHMAN
NUCCIO M. RASO
DONALD E. PAULSON
KENNETH A. ROBB
PETER D. SENS
LAWRENCE M. LEVY
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PHILIP L. SCHNEIDER
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OF COUNSEL
JOHN F. COLLINS

Francis J. O'Rourke, Esq.
61 Adams Street
Braintree, Massachusetts 02180

November 21, 1974

Re: *Robert C. Hahn v. Francis W. Sargent, et al*

Dear Mr. O'Rourke:

As it now becomes clear that your client indeed intends to press the above-captioned matter, I believe it proper to advise you that my client and the Judge to whom the case has been assigned worked together in State government and have a long-standing personal relationship, a relationship that extends to the Judge's father.

Although I do not believe the facts of these relationships require any present action on my part, I mention them to you from an excess of caution.

Very truly yours,

HILLER B. ZOBEL

HBZ:gks